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No. 86-6139

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

CLARA B. WATSON,
Petitioner,

v.

FORT WORTH BANK & TRUST,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 29, 1986
CERTIORARI GRANTED JUNE 22, 1987

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TABLE OF CONTENTS

	Page
Docket Entries in the Courts below	1
Transcripts of Proceedings in the United States District Court for the Northern District of Texas	4
Plaintiff's Case	4
Clara B. Watson, witness at trial	4
Gary W. Shipp, witness at trial	50
Thomas R. Marshall, witness at trial	75
Gary W. Shipp, witness at trial	107
Gary W. Shipp, witness at class certification hearing	117
Joy Chandler, witness at class certification hearing	118
Gary W. Shipp, witness at deposition	119
Defendant's Case	125
James K. McKnight, witness at trial	125
Richard A. Burt, witness at trial	129
Sylvia L. Harden, witness at trial	141
Paula Hill, witness at trial	146
Jacqueline Dancer, witness at trial	149
Patricia Cullar, witness at trial	151
Gary W. Shipp, witness at trial	163
United States District Court for the Northern District of Texas	178
—Memorandum opinion and order, dated March 3, 1983	178
—Memorandum opinion dated November 20, 1984	190
—Judgment dated November 20, 1984	203

TABLE OF CONTENTS—Continued

		Page
United States Court of Appeals for the Fifth Circuit		204
—Opinion dated August 27, 1986		204
—Judgment dated August 27, 1986		253
—En banc opinion on rehearing dated September 30, 1986		254
Plaintiff's Exhibits at Trial		255
Exhibit 9:	Rate of Hire by Race	255
Exhibit 10:	Offers of Employment by Race	256
Exhibit 11:	Offers to Secretarial Applicants, by Race	257
Exhibit 12:	Offers to Secretarial Applicants, by Race: Larger Pool	258
Exhibit 13:	Offers to Teller Applicants, by Race	259
Exhibit 14:	Tellers Hired from Teller Applicants, by Race	260
Exhibit 15:	Offers to Teller Applicants, by Race: Larger Pool	261
Exhibit 16:	Tellers Hired from Teller Applicants, by Race: Larger Pool	262
Exhibit 17:	Offers to Clerical Applicants, by Race	263
Exhibit 18:	Offers to Clerical Applicants, by Race: Larger Pool	264
Exhibit 19:	Clerks Hired from Clerical Applicants, by Race: Larger Pool	265
Exhibit 20:	Offers to Non-Professional Applicants, by Race	266
Exhibit 21:	Offers to Non-Professional Applicants, by Race: Larger Pool	267

TABLE OF CONTENTS—Continued

		Page
Exhibit 22:	Applicants, by Race, in Different Hiring Periods	268
Exhibit 23A:	Offers to Persons, by Race, who Applied during Periods when Bank Hired Less than Ten Percent (10%) of Applicants	269
Exhibit 23B:	Offers to Persons, by Race, who Applied during Periods when Bank Hired over Ten Percent (10%) of Applicants	270
Exhibit 24:	Departmental Segregation, by Race	271
Exhibit 25:	Departmental Segregation, by Race: Expanded Table	272
Exhibit 26:	Mean Evaluations, by Race, during Period of Class	273
Exhibit 27:	Intercorrelation of Employee Evaluations	274
Exhibit 28:	Statistical Regressions for Employee Evaluations, by Race	275
Exhibit 29:	Promotions and Compensation, by Race	276
Exhibit 30:	Promotion and Compensation Regressions	277
Exhibit 31:	Rate of Involuntary Termination, by Race	278
Defendant's Exhibits at Trial		279
Exhibit 1:	Salary Comparison—Tellers	279
Exhibit 2:	Applicant Data	280
Exhibit 3:	Survey of Utilization of Blacks: Tarrant County Banks	281

TABLE OF CONTENTS—Continued

		Page
Exhibit 4:	Salary Computation by Grade	282
Exhibit 5:	Salary Charts by Grade	285
Exhibit 6:	Employee Grade and Salary History	305
Exhibit 7:	Population by Ethnic Identity for Fort Worth and Selected Areas 1980	309
Order of the Supreme Court of the United States granting Certiorari and leave to proceed in forma pauperis dated June 22, 1987		311

DOCKET ENTRIES IN THE COURTS BELOW

DATE	NR.	PROCEEDINGS
		UNITED STATES DISTRICT COURT
1981		
Oct 21	1.	ORIGINAL COMPLAINT—CLASS ACTION
Nov 9	5.	Defendant's Original ANSWER.
1982		
Jan 18	8.	Plaintiff's MOTION for Class Certification.
Jul 13	A	TRANSCRIPT OF Proceedings (Class Certification Hearing).
Aug 27	139.	Defendant's MOTION And MEMORANDUM of Authorities In Opposition To Class Certification.
1983		
Mar 4	217.	MEMORANDUM OPINION AND ORDER . . .
Apr 22	230.	Deft's MOTION and MEMORANDUM of Authorities for Reconsideration of the Court's Determination that a class action may be maintained or in the Alternative, Motion to Amend Order to Permit Interlocutory Appeal
May 2	253.	Plaintiff's RESPONSE In Memorandum of Authorities to Defendant's Motion For Reconsideration of Class Certification and Interlocutory Appeal.
Jun 16	262.	ORDER . . . that Deft's motion for reconsideration of the Court's determination of class action and, in the alternative, motion to amend order to permit interlocutory appeal are hereby DENIED.

DATE	NR.	PROCEEDINGS
1984		
Feb 21	266.	Defendant's MOTION and MEMORANDUM Of Authorities For Further Reconsideration Of The Court's Determination On The Class Certification
Mar 30	276.	Plaintiff's RESPONSE and MEMORANDUM Of Authorities to Plaintiff Second motion for Reconsideration of the Court's Determination on Class Certification.
Apr 2	283.	Filed *PRE TRIAL ORDER . . . conference held on March 27, 1984 . . .*
Apr 26	297.	ORDER . . . that the motion for further reconsideration of the class certification of the class certification be DENIED and that the class certification order of March 4, 1983 remain in effect. In so finding, the Court reiterates that such a holding is in no way a decition on the merits of plaintiff's claims.
Jul 9	317.	Filed MINUTE ORDER . . . non jury trial commences this day.
Jul 10	318.	Filed MINUTE ORDER . . . non jury trial continues.
Jul 11	319.	Filed MINUTE ORDER . . . non jury trial concludes this day.
Aug. 10	C	Filed TRANSCRIPT OF PROCEEDINGS— Vol. 1 thru III
Nov 21	393.	Filed MEMORANDUM OPINION . . .
Nov 30	409.	Plaintiff's Rule 59 MOTION For New Trial And For Additional Findings of Fact,
1985		
Jan 15		Filed ORDER . . . plaintiff filed a motion for a new trial and for additional findings of facts.

DATE	NR.	PROCEEDINGS
1985		
Feb 4		Filed NOTICE OF APPEAL (Pltf) from the final judgment entered on 11-20-84.
		UNITED STATES COURT OF APPEALS
1986		
8/27/86		Opinion of USCA-5
9/30/86		rehearing denied
		UNITED STATES DISTRICT COURT
Nov 4	467	ORDER (1) pursuant to a decision by the Fifth Circuit in Watson v. Fort Worth Bank & Trust, 798 F.2d 791 (5th Cir. 1986), this Court vacates that portion of its opinion which states that the claims of the applicants for positions at the Fort Worth Bank and Trust are not meritorious. The applicants' claims are hereby dismissed without prejudice.
Nov 14	43	MOTION FOR RECONSIDERATION,
Dec 17	44	ORDER
1987		
Jul 24	47	487 JOINT STIPULATION OF PARTIES TO CORRECTNESS OF COPIES OF EXHIBITS LOST FROM RECORD

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA4-81-581-E

CLARA WATSON

vs.

FORT WORTH BANK & TRUST

TRANSCRIPTS OF PROCEEDINGS

[I Tr. of Trial 6:]

* * * *

CLARA B. WATSON,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BRENDER:

Q. Will you state your name for the Court?
A. Clara B. Watson.
Q. And whereabouts do you live, Mrs. Watson?
A. 6729 Westcreek Drive, Fort Worth, Texas.
Q. How long have you lived at that address?
A. A year.
Q. All right. And how are you employed, ma'am?
A. I'm employed by American Airlines.
Q. And in what capacity?
A. Lead service clerk.

* * * *

[I Tr. of Trial 11-13:]

* * * *

Q. Okay. All right. Now, when you—how did you first come to apply for a position at the Fort Worth Bank & Trust?

A. I just decided to look in the telephone directory and get, you know, a bank.

Q. All right. You decided you wanted to get in the banking world?

A. Yes.

Q. And you applied for a teller position?

A. Yes.

Q. Were you hired?

A. Yes, I was hired.

Q. As a teller?

A. No.

Q. Well, what—what position?

A. Proof operator.

Q. What did the proof operator do?

A. We would balance the account—your deposits that a customer would bring in, we would balance it toward their statement. You know, if they said $300, we would run it through the computer to verify such, and any cancelled checks that were cashed we would run all these items through the transit machine.

Q. Okay. And you say "we." How many people were doing that job at the bank at that point?

A. There were approximately three operators at that time.

Q. All right. Where was the proof operation? What part of the bank was it—

A. It was located in the building behind the tellers' counter.

Q. Okay.

A. The main lobby of the bank.

Q. All right. And was it in a place that was visible to the bank customers?

A. No, it was behind a wall.

Q. All right. When you went to work for the bank in August of '73, how many blacks approximately were working for the bank at that time?

A. Approximately four.

Q. And besides yourself, who would that be?

A. It would have been Irma Wright, Thelma Gibbs and Bobbie Washington and, there was Leroy—I can't remember his last name. He was a porter.

Q. He was a porter?

A. Uh-huh.

Q. What did the other three women do that you just mentioned? What were their jobs?

A. Bobbie Washington was the kitchen attendant, and Thelma Gibbs and Irma Wright, they were check printers in the basement.

Q. What was their job, to print the checks?

A. Print the checks and deposit slips.

Q. All right. They didn't have any customer contact?

A. No.

Q. And neither did you in your job as a proof operator.

A. No.

• • • •

[I Tr. of Trial 14:]

• • • •

Q. Then what job did you get?

A. Teller trainee.

Q. All right. And how did you happen to come by and receive that teller trainee job?

A. Well, I had expressed my desires to Gary, Gary Shipp on several occasions that I wanted to be a teller, and every chance I got I'd go to him and ask if I could be a teller, you know, and I didn't acquire the job until there was a, a black that worked there that went to EEOC that filed a complaint concerning discrimination, and I still expressed the desires to be moved and I was moved right after that.

• • • •

[I Tr. of Trial 18-19:]

• • • •

Q. All right. Did—had you been asking to be a teller at that time?

A. I was.

Q. Prior to—

A. I had asked to be a teller at that time.

Q. And did you know why at that time you had not been made a teller?

A. Well, Gary told me, you know, we had conversations about that and he told me that it was a big responsibility and it was a lot of money and he said that, you know, "I don't know, girl, it's just a big responsibility," and he said, "It's a lot of money, you know, for blacks to have to count."

• • • •

[I. Tr. of Trial 23:]

• • • •

A. Yes.

Q. Had there ever been a black teller at the bank before?

A. No.

Q. All right. And where were you working? Where within the bank were you working initially?

A. As a trainee, I worked in the lobby. And after I completed training, I went to the motor bank, the drive-in is what they called it during that time.

Q. Okay. And that's where the automobiles would come into the—

A. That's correct.

Q. Through the pneumatic operation of the bank?

A. Yes.

Q. Okay. Now, how long did you—were you a—an employee and how long did you remain in this job as a teller?

A. Well, I was—I guess you would say until '81. I was still a teller and assistant to Richard Burt.

Q. Okay. What was your—let me ask you this: Did you receive during the time you were at the bank periodic salary increases?

A. Yes.

Q. How were those determined?

A. Evalua—well, the latter part was evaluations.

• • • •

[I Tr. of Trial 25-27:]

• • • •

Q. Okay. But prior to '78, there were always oral reviews; there was never a written—

A. Yeah, it was oral.

Q. Okay. And how was the amount of the salary increase determined prior to '78, if you got a salary increase?

A. How was it determined?

Q. Uh-huh. Do you know what the standard was or what did this oral review consist of? What did they tell you at the oral review?

A. Well, they would tell us about our outages. You know, "You have very few outages this time and you have done a good job. The customers are happy with you and, you know, you have been to work promptly," you know, or something to that nature.

Q. And outages are what? Are those shortages?

A. Shortages, on, you know, on your money box.

Q. Okay. And would they tell you how much of a salary increase you were going to get?

A. Yes.

Q. Prior to '78, approximately what was that on a yearly basis?

A. Well, it wasn't percentage-wise. It was always told to me you are going to get $15, $20 raise, you know, per month.

Q. Something like that?

A. Yes. I didn't get any percent.

Q. Okay. Now, in '78, there was a procedure whereby there was a written review; is that correct?

A. Yes.

Q. And then based on the number of points you got, you were awarded a certain percentage increase in salary, as I understand it; is that correct?

A. That was the way it was explained to me.

Q. Okay. And how often were the reviews after '78 once they were written reviews?

A. Once a year.

Q. All right. And you left the bank, resigned in 1981; is that correct?

A. That's correct.

Q. How many reviews, or these written reviews did you have?

A. Two.

Q. Okay. And who was the supervisor that performed those?

A. One was Gail Leavitt. The other was Brian England.

Q. Okay. And each of them were approved by Mr. Shipp; is that correct?

A. That's correct.

Q. At the time that you left the bank, had there ever been—During the period of time that you were at the bank, let me put it that way, from that—during that about eight-year period, was there ever a black supervisor—

A. No.

Q. —at the bank?

So, the people who were filling out the reviews and doing the reviews, be they oral or written, were all white; is that correct?

A. That's correct.

Q. Were there any blacks in management of the bank at all?

A. No.

Q. Were there any black loan ficers?

A. No.

Q. Or any of the president, vice president, none of those people were black; is that correct?

A. No.

Q. To your knowledge, were there any blacks on the Board of Directors?

A. To my knowledge, no.

• • • •

[I Tr. of Trial 32-33:]

Q. Okay. Clara, we were referring to this portion where it says, "This is a performance evaluation rating," and it was 72 scatched out and a 70 placed there; is that right?

A. That's right.

Q. And then the increase appears to have been written over and the percentage appears to have been written over, too; is that corrct?

A. That's correct.

Q. And when you look down at the evaluation, the 8 percent is circled and then the 7 percent is circled; is that right?

A. That's correct.

Q. And when you look down to the increase award it has a 7 percent increase which totals $45; is that right?

A. That's correct.

Q. Okay. Now, was that the award—was that the pay increase that you received in that evaluation, $45 apparently a month?

A. That's correct.

Q. All right. But it had been reduced from 7 percent to 8 percent from the point in time when your supervisor first marked the sheet; is that correct?

A. Yes.

Q. All right. And who was your supervisor at that point?

A. Gail Leavitt.

Q. And is that a male or female?

A. Female.

Q. And when she had evaluated you, you had 72 points, which would have given you an 8 percent raise; is that correct?

A. That's correct.

Q. Who made the decision to lower, first of all, the friendliness and courtesy rating on page 5 of the evaluation so as to decrease your raise by one percentage point?

A. Gary Shipp.

Q. All right. And is his signature the one that is on the bottom of this Nonofficer Salary Review worksheet?

A. Yes, that's correct.

Q. All right. To your knowledge, are officers at the bank rated on a type of a scale?

A. No, sir, not to my knowledge.

Q. All right. Now, were you aware of whether or not Mr. Shipp on a regular basis rated employees down or took over the—or changed the rating of the supervisors?

A. Well, my supervisor informed me that he did.

• • • •

[I Tr. of Trial 36-37:]

• • • •

Q. All right. Now, in 1980 you mentioned two jobs that opened up and I would like for to you describe briefly for the Court what each of those jobs entailed?

A. Okay. The job at the motor bank was the supervisor's job over the motor bank tellers, and you would have supervision over your employees that worked there; and you would okay checks, the ones that, you know, needed your initial on them, check the money shipments, see that the vault was locked. You know, just general overall supervision of the employees there.

Q. All right. Did you—would you also have responsibility, for instance, of rating or evaluating those employees?

A. Yes, yes, you would.

Q. All right.

A. And you would also, if there was anyone to be hired, you would visit with them, you know.

Q. All right. You would make at least some interview of the person; is that correct?

A. Yes. You wouldn't have the final say but you would have an interview with them.

Q. Who had the final say in hiring the people at the bank?

A. Gary Shipp.

Q. All right. Now, what was the other position, the lobby supervisor?

A. The lobby supervisor, you would be supervising the lobby tellers; also have control over the vault, checking the money shipment and seeing that, you know, all the tellers balanced, okaying checks that were, you know, out of the ordinary, and you would also have supervision over the motor bank position, you know, the teller. I mean, the supervisor. I'm sorry.

Q. So, the supervisor at the motor bank reported to the supervisor of the lobby?

A. Of the lobby, yes.

Q. Okay. And who did the supervisor in the lobby report to?

A. Gary Shipp.

• • • •

[I Tr. of Trial 39-40:]

• • • •

Q. All right. And to whom did you apply for these positions?

A. I went to Gary Shipp personally.

Q. And you asked him to be considered for each of those jobs; is that correct?

A. Yes.

Q. What did he tell you?

A. Well, he said that he would put my name in the running.

Q. All right.

A. That's what he said.

Q. Did he inform you as to who else was in the running?

A. No.

Q. Okay.

A. Huh-uh.

Q. And was there anything that indicated, anything in writing that you ever saw, that indicated what qualifications were necessary for those particular jobs?

A. No, no.

Q. All right. Did you get either of those two promotions or were you promoted to either of those two jobs—

A. No.

Q. —in February of 1980?

A. No.

Q. All right. Who received the lobby supervisor's job?

A. Richard Burt.

Q. And who received the motor bank supervisor's job?

A. Pat Cullar.

* * * *

[I Tr. of Trial 41-43:]

* * * *

Q. All right. Now, did you know each of them? Were they employees of the bank at the time?

A. Yes.

Q. All right. And what had Richard Burt's job been prior to the job as a lobby supervisor?

A. He had been—

THE COURT: I thought he was the motor bank.

MR. BRENDER: No, excuse me, Your Honor. Richard Burt was the lobby and Pat Cullar was the motor bank.

THE COURT: All right.

THE WITNESS: He had been bookkeeping supervisor.

BY MR. BRENDER:

Q. All right. And prior to that, what job had he done at the bank?

A. Prior to that, he was in accounting and previous to that he was a teller, started out as a teller/trainee.

Q. All right. And when did you start as a teller trainee?

A. I can't give you the exact year, but it was in the '70s.

Q. Okay. And was it after you were, had been made a teller?

A. Yes.

Q. And did you assist him or train him in any way when he first came on board?

A. Yes. He worked in the motor bank and I, along with a few others, you know, trained him.

Q. When he first came to work there; is that correct?

A. Yes.

Q. How old a fellow was he when he came to work there?

A. Approximately 20. Maybe—about 20 years old, I believe. I am not really sure.

Q. All right. And he was a white male; is that correct?

A. That's correct.

Q. All right. And Pat Culler, who was a white female; is that correct?

A. Yes.

Q. And she got the motor bank supervisor job; is that correct?

A. Yes.

Q. How long had she been at the bank at the time?

A. I believe prior to her making motor bank supervisor, I believe she had been there three, about three years, almost three years. Somewhere in there.

Q. Okay. And at the time—at this time in 1980 you had been there approximately seven years; is that correct?

A. Yes.

Q. Okay. What had Pat Culler's job been with the bank prior to her getting the motor bank supervisor job?

A. She was a commercial teller.

Q. All right. And where did she work, inside?

A. The lobby.

Q. In the lobby?

A. Yes.

Q. All right. Had she—what had she done prior to that, if anything? In other words, did she have the same job the whole three years or had she had any other job at the bank?

A. I believe she had the same job.

Q. All right. Had she ever been out in the motor bank, to your knowledge?

A. One Saturday a month, if that many.

Q. But that was not her regular position?

A. No, no. It was extra.

* * * *

[I Tr. of Trial 44-47:]

* * * *

Q. All right. Had Pat Culler, to your knowledge, while she was at the bank, been in a supervisory position before she was advanced to this position?

A. Not to my knowledge.

Q. All right. Then did you—after that, this being in February or so of '80, you then became an inside teller; is that correct?

A. I came inside—I believe I came inside in '79, the latter part of '79.

Q. Okay. So this was prior to the motor bank job becoming available?

A. Uh-huh.

Q. Okay. Was that any kind of promotion when you went from the teller outside or what we call the outside teller to the inside?

A. No.

Q. That didn't involve any kind of promotion or anything?

A. No.

Q. All right. Or at least any increase in pay, I take it.

A. No.

Q. All right. Now following, then, the new supervisory jobs, what duties did you assume with regard to Mr. Burt while he was then the inside teller supervisor?

A. Well, when the memo came out that Richard was named as the supervisor, well, Richard told me that Gary wanted to see me, and Richard and I and Gary Shipp were in his office and he told me that Gary—

Q. You've got two of them.

Okay. Who?

A. Gary. Gary said that, you know, he was sorry that I didn't, you know, get that position but there's another position that he was hoping that I would be interested in. And I asked him, you know, "Which one?" And he said, "Well, how would you like to be Richard's assistant?"

And I asked him, I said, "well, his assistant, does this mean, you know, that I would be assistant supervisor of, you know, or just what would it mean? What would I have to do?"

And he said, yes, that it means that I was assistant, assistant to the supervisor. Richard was the supervisor. And he left and told Richard, "You can go into detail and explain her duties."

Q. All right. And this was right after the promotions had been made in the supervisors' jobs?

A. Yes.

Q. Did this assistant position that he was describing to you, did it carry or entail any kind of increase in pay?

A. He didn't tell me that it did at the time.

Q. Did you get an increase in pay?

A. I believe I did eventually.

Q. Eventually. Not right away?

A. No.

Q. Okay. By "eventually," you mean, though, sometime prior to your annual review?

A. Yes.

Q. Okay. Now, what, then—how did your job differ, then, after you became the supervisor of the—or the assistant to the supervisor of the inside lobby? What duties did you have then that you didn't have before?

A. Well, I had assumed quite a few of Richard's duties from his desk, and I also had—he let me assign out the work to the tellers that was inside and I could schedule the relief for Bobbie like from the teller, every teller had to relieve her from lunch at one point in time. And I could okay checks, like large-item checks, or customers that came in that had a problem with a draft or to that nature. And I would stay and help the tellers with their outages. Those were part of the duties.

Q. All right. I want you to look briefly at Plaintiff's Exhibit 4 that we introduced there; the first page, the one that has the last figure, which is your employment file.

It has employment history. It has the department you worked in, the rate of pay, the dates.

It appears that your reviews, that you had a review 8-1 of '79 which we have looked at where you were rated and given a $45 a month increase.

Then if you look right under that it has 2-80. It has position, commercial teller, department teller, and has a $45 a month increase.

Is that correct?

A. That's correct.

* * * *

[I Tr. of Trial 48:]

* * * *

Q. All right.

A. Looking at the 2-80, I became a commercial teller inside also, along with assuming the duties with Richard Burt.

Q. Okay.
A. And I got a raise.

* * * *

[I Tr. for Trial 50-51:]

* * * *

Q. All right. Now, did you—how long did you serve, then, in this capacity as both a commercial teller and as an assistant to Richard Burt?
A. Until January of '81.
Q. Okay. What happened in January of '81?
A. Well, I went out on surgery. I had left the bank to go out, you know, to have foot surgery.
Q. All right. When had—when did you have the foot surgery?
A. I had the foot surgery January, '81.
Q. Okay. When you say you left the bank, you didn't leave your employment?
A. No, I didn't quit. I just, you know, took a leave, sick leave.

* * * *

[I Tr. of Trial 56-62:]

* * * *

Q. Now, in January of 1981, two more jobs opened up, did they not?
A. Yes.
Q. All right. And what two jobs opened that you were seeking?
A. The same two jobs.
Q. The exact same two jobs?
A. Yes.
Q. All right. And how did that happen? Richard Burt was in the one job. Did he leave the bank or did he move up, or what was his—
A. He got a promotion. He moved up.
Q. To what job?
A. I believe he was made vice-president or to that nature.

Q. All right. And then what about the other job, the motor bank supervisor job? How did it open up?

A. When they made a decision on Richard's job, they made a decision on his job first.

Q. I see.

A. And when they made that decision, well, that was Pat Cullar. So she came inside and that left her job open.

Q. I see. Okay. So the first job to open up was the same job that was opened up almost a year before?

A. Yes.

Q. And that was the insider or lobby supervisor position?

A. Yes.

Q. And did you apply for that job?

A. Yes.

Q. And to whom did you apply?

A. To Gary Shipp.

Q. And was this oral or in writing?

A. Oral.

Q. And what—did he say anything to you or did he mention—

A. Same thing; they would put me in the running.

Q. Okay. Did you know who else had applied for that job?

A. Sylvia Hardin had.

Q. All right. Anybody else?

A. Mildred Daw had mentioned that she was. I didn't know anything definite. She had said that she was going to.

Q. All right. Anybody else that you were aware of?

A. You're talking about Richard's job; right?

Q. Yes.

A. Pat Cullar, you know, she had applied.

Q. All right. And who got that position?

A. Pat Cullar.

Q. And after she got—And who announced that she received that position? Do you know?

A. Richard called me at home and told me. I got a phone call.

Q. All right. And had the decision to promote Pat Cullar, once again, had that been made by Gary Shipp?

A. Yes.

Q. All right. And then Richard Burt called you and told you about it; is that right?

A. Yes.

Q. And what, if anything, did he tell you about how the decision had been made or whatever?

A. Well, he called me and said, "Hello, Clara" And I was at home and he said, "I just wanted to let you know, about the job and who got the position," and he said, "Pat Cullar got the job," and I got a little upset with him and I asked him, "Well, why?" You know, "Why did she get the job when I was his assistant and I had worked real close with him?" And he said, "Well, you know, she's better suited for the job."

Q. That was the only explanation you received?

A. Uh-huh.

Q. Did you have a discussion with Gary Shipp about the same matter about why she got the job and you hadn't?

A. Yes.

Q. When was that?

A. I called him on the phone the same day.

Q. This was while you were at home recuperating—

A. Yes.

Q. —from the surgery?

A. Yes.

Q. All right. And what did he tell you?

A. He stated the same thing, that she was, you know, better suited for the job.

Q. Okay. Now, you had had more experience at the bank than she had; you'd been there longer?

A. Yes. And I expressed all those ideas to Gary and to Richard.

Q. All right. Now, was there any mention made at that point then of her job, of the fact that job was open?

A. Yes. In fact, Richard told me earlier that day when I talked to him that, you know, since she's got that

job, that I could apply. He said, "You can apply for the motor bank supervisor."

Q. Okay.

A. And he said, "We'll make that decision in a few days."

And I told him, "well, I'll have to think about it," at that point.

Q. Why did you tell him that?

A. Because I felt that I wasn't going to receive that position, either. You know, I had applied and been unsuccessful; never received anything before.

Q. All right.

A. So I told him, "I'll think about it."

Q. All right.

A. And I called Gary and this is what he told me, that Pat was better suited for the job, you know; and like I told him, "I just don't understand, you know, how can she be better suited? What, you know, what was the classification, you know, of being suited, you know, for the job?"

And he just said, "Well, girl, you know, the other job's opening up over at the motor bank and if you're interested," he said, "I'll drop your name in the hat." Those were his words.

Q. And what did you tell him?

A. And I told him, "I don't know. I am not sure." I said, "I'll call you back later today and let you know."

Q. And what did you do?

A. I thought about it, and then after the bank closed, well, I called Richard and I told him that I was interested.

Q. By "the bank closed, "you mean after 2:00 o'clock?

A. After 2:00 o'clock, yes.

Q. And you told Richard you were interested in the motor bank supervisor job?

A. Yes.

Q. Did you then call Gary Shipp and tell him the same thing?

A. He said that he would tell Gary. Gary was out of the bank.

Q. Okay. And then was there a decision made on the motor bank supervisor job?

A. Yes. There was a decision made on that.

Q. When was that made?

A. A few days, you know, later on. I can't really tell you how many days it was, but it was a few days.

Q. Were you still recuperating from this foot surgery at that time?

A. Yes.

Q. Who was then given the motor bank supervisor job?

A. Kevin Brown.

Q. And Kevin Brown is a white male?

A. Yes.

Q. And the Pat Cullar that got Richard Burt's job is the same Pat Cullar who was the white female we talked about a little earlier?

A. That's correct.

Q. And did you know Kevin Brown?

A. Well, I knew him from working, you know, at the drive-in. He was a part-time employee.

Q. All right. About how long had you worked at the bank when he got the motor bank supervisor job?

A. Part-time, I think he had worked about approximately a year. That's just guessing, you know. It's not anything—About a year, I believe, as part time.

Q. All right. How long had he been full time, a full-time employee with the bank?

A. Only a few months.

Q. All right. How old a fellow was Kevin?

A. Kevin?

I don't know. 19 to twenty-ish, somewhere.

Q. All right.

A. He was young.

Q. And how many employees was he then supervising as a motor bank supervisor?

A. Let's see. Approximately seven, I believe.

Q. All right. And had he done any supervision of anybody there at the bank prior to that?

A. No.

Q. His job had been what?

A. Teller.

Q. Okay. And by part-time, what would he work?

A. He worked afternoons; come in at 2:00 o'clock and got off at 6:00, closing.

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[I Tr. of Trial 73-74:]

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Q. All right. And following this, by the way, you had some more foot problems that necessitated some additional surgery, did you not?

A. That is correct.

Q. And when did you have the additional surgery?

A. A few weks after that decision was made, I had another surgery.

Q. All right. And then you were out with this foot problem until sometime in August of '81; is that corect?

A. That's correct.

Q. All right. And during that time, was the bank paying you a salary?

A. N-

Q. A.. right. And you—the foot problem had begun when you had fallen, I believe, on the job, had it not?

A. Yes.

Q. And you were receiving worker's compensation, were you not?

A. That's correct.

Q. All right. And that paid a portion, up to two-thirds of your salary, I believe is what the law requires; is that correct?

A. That's correct.

Q. All right. In August of '81, what action did you take with regard to the bank?

A. In reference to—

Q. Did you resign your position with the bank?

A. Oh, in August of—Yes, I did. In fact, it was August 10th, '81, I—

• • • •

[I Tr. of Trial 96-97:]

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Q. All right. Well, then, let's just talk about it in terms of when you were there.

The jobs in which—There are—how many floors, by the way, does the bank take at the present building that they are presently occuping or did it at that time?

A. At that time, there were three floors.

Q. Three floors?

A. Yes.

Q. All right. And what would they be?

A. The third floor was the executive floor, the president's office, and the second floor was the main lobby area.

Q. All right.

A. And the lower floor was where the vault and safety deposit, bookkeeping, the lunchroom and the restrooms.

Q. All right. Did blacks occupy any positions up on the third floor in those jobs that had to do with the executive offices, be they secretary or anything of that sort?

A. No.

Q. What about the second floor in the lobby area?

A. There was, yes, yes.

Q. All right. And what about on the third floor in the basement area?

A. Yes.

• • • •

[I Tr. of Trial 98:]

Q. Did you ever seek a transfer? Do you know what I mean by "transfer?"

A. Well, I worked at the motor bank and I tried to transfer into the lobby, and it took quite a while to get in there.

Q. Okay. Do you know whether or not that there were other—when you were trying to seek a transfer to the lobby, were there any blacks that were working in the lobby at that time?

A. No.

Q. All right. Do you know whether or not it was harder for blacks to get into the lobby or transfer to those positions than whites?

A. I believe so, because there were whites that were in there that worked at the drive-in.

Q. All right. And they were transferred while you were seeking a transfer and you were not?

A. Yes.

Q. Did you have more—Who specifically are we talking about?

A. Linda Schell was one that worked at the drive-in.

Q. Did you have more seniority than she did?

A. Yes.

Q. All right. Now, were there ever—With regard to that transfer policy, who would be responsible for making those decisions?

A. The supervisor and Gary Shipp.

* * * *

CROSS EXAMINATION BY MR. McGEE

[I Tr. of Trial 113-16:]

* * * *

Q. Okay. In your previous testimony and in your complaint before this Court, you've made allegations to the effect that the bank has discriminated against you in a number of different ways, including placement in the bank.

Did you consider your initial placement in the proof department as a proof operator to be a discriminatory act by the bank?

A. Did I consider it to be discriminatory?

Q. Yes, ma'am.

A. Being placed or working as—

Q. Well, initially being placed as a proof operator, did you consider that to be discriminatory?

A. Being placed—I did, being placed in the back when I initially applied for teller trainee with customer contact.

Q. Excuse me. Do you know if any teller positions were open when you made your initial—

A. I am not sure.

Q. Why is it that you consider that the location of the proof department was discriminatory against you?

A. It was noncustomer contact.

Q. Were there white people working in these jobs?

A. Yes, there were several.

Q. And this was in the old bank on Nashville Street?

A. Yes.

Q. All right. In approximately a year to two years, you were granted a promotion to teller and you went into the—did you go into the motor bank immediately?

A. I worked in the lobby from two to three months, training.

Q. While you were training?

A. (Nods head.)

Q. While you were there, did the bank do anything to shield you from public contact as a teller?

A. I don't understand your question.

Q. Well, did the bank—the bank or any of its employees, take any action to keep you from having contact with the customers while you were training there in the lobby?

A. No.

Q. Okay. You stood where the rest of the tellers stood and performed substantially the same functions that they did, did you not?

A. No, I didn't. I stood behind the teller that was—I watched.

Q. All right. Was that part of the training?

A. Yes, I assume so.

Q. All right. Did you eventually have your own window or stand in the window for a period of time?

A. On Fridays, 4 to 6.

Q. And you had contact with the public at that time, did you not?

A. Yes.

Q. There were customers who came in the bank who were both black and white, were there not?

A. Yes.

Q. Okay. After your initial training period, you testified that you were placed in the motor bank.

Did you consider that placement to be discriminatory?

A. Placed in the motor bank?

Q. Yes, ma'am.

A. No.

Q. All right. Was the motor bank an acceptable place of work, so far as you were concerned?

A. It was public contact.

Q. Okay. Was your job in the motor bank substantially the same as other tellers in the motor bank?

A. Yes.

* * * *

[I Tr. of Trial 117:]

* * * *

Q. And do you remember about how long it was after your initial hire that Mr. Shipp came to the bank?

A. He came about—I am estimating—about two-and-a-half to three years, I believe.

Q. Okay. So Mr. Shipp had nothing to do with your initial placement in the proof department or anything that had to do with your hire at the Fort Worth Bank & Trust, or State Bank of East Fort Worth as it was known then; is that true?

A. That's true.

* * * *

[I Tr. of Trial 120:]

* * * *

Q. All right. You've made mention a couple times about that fact Mr. Shipp referred to you as "girl."

Do you consider that to be some sort of racial slur?

A. No, I don't consider it to be a racial slur. I just consider it as being very inconsiderate of not wanting to learn a person's first name.

• • • •

[I Tr. of Trial 124-26:]

Q. You did receive a pay increase when you were promoted to teller, did you not?

A. I don't remember.

Q. Well, do you remember that you did not or do you remember—or you just don't remember at all?

A. I don't remember if I—if I received one immediately. From the notice that, you know, I have seen it indicated that I did.

Q. Okay. But you don't have any reason to think those notes are incorrect, do you?

A. Well, I didn't give it any thought.

Q. You did receive periodic increases in your salary while you served as a teller, did you not?

A. I believe I got a raise once a year, and then there was an instance where I got a raise two times in one year, and I believe that year was '79.

Q. Okay. Was that a merit raise given to you because of some particularly good work you had done?

A. I made a commercial teller.

Q. Was that the raise that you testified to, then, about a $45 raise and that was, I believe, in February of '80?

A. Yes.

Q. All other times while you were a teller, or as far as that goes, while you were employed by the bank did you receive the normal reviews, and if you were entitled to an increase, an increase at that time?

A. I received once a year verbal reviews.

Q. And did you receive increases as a result of those reviews?

A. Yes, I got a small amount, yes.

Q. All right. Were you complaining about the amount of the increase that you received?

A. Yes.

Q. Okay. Herefore, Ms. Watson, I believe you testified that you didn't have any complaints about the salary that was paid to you other than you thought that you were paid less than some white employees, but that you basically feel like that you were treated fairly as with regard to your salary and increases that were given you. Is that no longer your testimony?

A. That's still my testimony.

I also state just what I have stated a minute ago, that I did get small amounts of increases.

Q. Maybe I'm not following you then. Are you just saying that you would have liked to have received more?

A. I would have loved to have received more; that is all I am saying.

Q. I understand that without any problem.

Do you feel like these small increases were a result of your race, or just as a result of the fact that the employer didn't give as large a raise as you would have liked to have received?

A. Well, in my opinion, in that case I really didn't sit down to analyze it, you know, either way.

* * * *

[I Tr. of Trial 127:]

* * * *

Q. So far as you could tell, Mrs. Watson, did the bank review its white employes or its nonblack employees in the same fashion that it reviewed the black employees at that time?

A. I can only speak—I don't know. I guess so. I assume so. I don't know.

Q. You have no knowledge or indication they were treated any different, do you?

A. No.

* * * *

[I Tr. of Trial 128:]

Q. All right. Then in '78 or '79 when the bank instituted the formal written evaluations, did you view that as any form of discriminatory practice against black employees?

A. On the questions, no, I didn't view that as discriminatory, but the answers, yes. The opinions, yes.

Q. The opinions expressed by the supervisors?

A. Yes.

* * * *

[I Tr. of Trial 149:52:]

* * * *

Q. Now, you have testified that you know that she considered herself to be in line for the job and you've pretty much agreed with me, I think, that her dissatisfaction over not getting the job is what caused her to leave the bank.

A. Well, I didn't agree to that. I agree she was unhappy. Why, I don't know. She didn't tell me.

Q. All right. And she was your immediate supervisor, at the time this job came up. Was she not?

A. I believe I had finally gotten inside. I was working under Brian then.

Q. All right. Well, she had been your supervisor?

A. She had been, yes.

Q. She would have evaluated you in August of '79.

A. And I went inside right after that.

Q. But you consider the bank's decision not to give the job to you to have been racially motivated, but you don't have any similar feelings because of Ms. Leavitt. Do you think she was denied that job because of her sex or her race? And she was white, so I guess that wouldn't apply.

A. Well, I couldn't begin to answer that because I don't have any fact that she was even denied or that she even applied.

Q. Do you know what Gail Leavitt's qualifications were? Do you have any firsthand knowledge of that?

A. I don't have any, no.

Q. Do you know what Sylvia Hardin's personal qualifications were?

A. No.

Q. What about Richard Burt's? Do you know what his qualifications were?

A. No, I didn't know what his qualifications were.

Q. Okay. You don't know, then, whether or not Mr. Burt had far superior qualifications for that job than anyone else that made application?

A. Well, he had previously—when he came to the bank, he had no experience. And soon after that, he was experienced as a bookkeeper. He was experienced as a teller. He got experience as bookkeeping supervisor right at that bank. So his—other than stating what was happening right there, well, then I can't, you know, express any ideas on his experience other than that.

Q. Very good.

You knew or did you know what Pat Cullar's qualifications were when she made application for the motor bank supervisor in 1980?

A. No.

Q. Okay. Who else, besides Pat Cullar and yourself, made application for that position?

A. Sylvia Hardin, again.

Q. All right. And I suppose your answer would be the same; you were not familiar with what Sylvia Hardin's qualifications were, were you?

A. No, I wasn't.

Q. Were you aware of anyone else, other than Ms. Hardin and yourself and Ms. Cullar, making application?

A. No, nothing definite. There was quite a few people saying they were going to, but I don't know if they did.

Q. All right. So in the—when the decision was made in 1980 to hire Pat Cullar as the motor bank supervisor, you were not then aware of who had the best qualifications. You knew what your qualifications were. You did not know what any of the other applicants' qualifications were; is that correct?

A. That is correct.

• • • •

[I Tr. of Trial 167-74:]

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Q. Now, in January of '81, you went on sick leave to have your foot surgery, and this was while you were serving as commercial teller.

Were you still working with Mr. Burt as his assistant or did you cease to have work at that time?

A. No, I was still working with him.

Q. And you went on—had your foot surgery in '81, January; and sometime about February of '81 is when these two positions came open again, lobby supervisor and the motor bank supervisor.

Now, you were home either getting ready to have surgery or recuperating from the surgery, were you not?

A. Yes.

Q. Okay. How did you become aware of the fact that there were—these two jobs were open?

A. That was in February of '81.

Sylvia called me.

Q. Are you sure it was Sylvia, or was it Mr. Burt that called you?

A. No, it was Sylvia that called me.

Q. Okay. Did Sylvia notify you of both positions or just one?

A. She notified me of the one position, and Richard Burt informed me of the other one.

Q. And when Mrs. Harden contacted you and notified you of the opening, did you—what action did you take?

A. I was excited, and I called up—you know, I called over to the bank to—

Q. Did you talk to Richard or to Gary?

A. I called and I talked to both of them, you know, about the position.

Q. The—And Richard was the one who was leaving the teller supervisor?

A. He was leaving his position, yes.

Q. Did you tell Richard that you were interested in that job and would like to be considered?

A. Yes.

Q. Okay. Do you know of your own knowledge, Mrs. Watson, who else made application for that lobby supervisor job?

A. Pat Cullar, Sylvia Harden, myself.

Q. All right. How do you know that?

A. Richard told me that they had applied.

Q. Okay. Now, Pat Cullar, at the time she applied, she was the motor bank supervisor, was she not?

A. Yes.

Q. And Sylvia Hardin was commercial teller at the time?

A. Teller, yes.

Q. And who else applied? Did you say anyone else?

A. I don't know.

Q. Okay. Do you know that there were no others, or are you just not aware of who they might be?

A. I am just not aware.

Q. Those two that you've named, Pat Cullar was the one who was ultimately selected; is that correct?

A. That is right.

Q. All right. Did you consider yourself to be better qualified for that lobby supervisor job than Pat Cullar was?

A. Well, there again, I had worked as Richard's assistant doing the very job that was open.

Q. Now, Ms. Cullar had been supervisor for about a year; had she not?

A. At the motor bank, yes.

Q. Those jobs are essentially the same, are they not?

A. Yeah, but a supervisor—a supervisor is not a supervisor.

Q. How is the lobby supervisor's job different from the motor bank supervisor's?

A. The lobby supervisor was over the motor bank supervisor, and generally over the tellers that was under that supervisor also, you know. They had to go through the chain of command.

Q. So that the lobby supervisor was a greater responsibility than the motor bank supervisor?

A. Yes.

Q. Did you consider yourself to be better qualified than Ms. Cullar to take that job?

A. Yes.

Q. Okay. Now, what about Sylvia Hardin, did you likewise consider yourself to be better qualified than Ms. Hardin to be—

A. I did.

Q. —the teller supervisor?

A. I did.

Q. I think you testified then, that Mr. Burt called you up and informed you that Pat Cullar had been selected as the lobby supervisor, and informed you of the fact that because she was leaving her current position that there would be an opening there.

A. Yes.

Q. Okay. Did you—we know from your testimony that you ultimately did make the decision that you wanted to be considered and you conveyed that to him; is that correct?

A. I told him I would think about it.

Q. And then you later called him back and said that—

A. The same day.

Q. And said you wanted to be considered?

A. Yes.

Q. All right. Do you know who was considered for that position? Who made application for it?

A. Evidently Kevin Brown.

Q. Obviously he must have, because he was selected. Do you know of anyone else who did?

A. Myself.

Q. What about Sylvia Hardin; did she make application?

A. She had applied also.

Q. Do you know of anyone other than those two, or the three of you, rather?

A. No.

Q. Did you consider yourself to be better qualified for that position than Mr. Brown?

A. I did.

Q. Okay. And, likewise, I assume that you considered yourself to be better qualified for that position than Mrs. Hardin?

A. I did.

Q. All right. Did—were you aware, Mrs. Watson, that Kevin Brown had served as assistant to Pat Cullar in the motor bank?

A. I was not aware.

Q. Okay. If you had been aware of it, would your opinion as to who was the most qualified have been different?

A. No, it would not have.

Q. Well, you testified just a minute ago, I think, that there is a difference between the motor bank supervisor and the lobby supervisor.

Mr. Brown was working there with Ms. Cullar, so he would have a little closer knowledge of how it was working at that time than you would; is that correct?

A. That would—I wouldn't agree with that at all.

Q. All right.

A. The reason being—I would like to state that the reason being, he did not have not even quite two years'

banking experience and I had all of those years of experience behind me.

Q. You had served as a teller for, what, about—let's see. By then about six years?

A. Approximately, somewhere around there.

Q. Approximately five or six years?

A. Somewhere in there.

Q. Whereas Mr. Brown only had something around two years' worth of experience?

A. A little over a year or somewhere to that effect.

Q. Okay. You realize, do you not, Mrs. Watson, that part of the responsibility of a supervisor is to manage or motivate or control people working underneath you; it is a management job rather than just a clerical job. You understand that; do you not?

A. Of course.

Q. Okay. So would you agree with me, Mrs. Watson, that someone could be an excellent technician and do a particular job better than anyone else could and still not be a very good manager of people, not be qualified to—he might be able to do the job better than anyone else but still not be suitable to supervise others doing that same job. Would you agree with that situation?

A. I agree to that.

Q. Have you, in fact, probably experienced that situation where someone was in a supervisory position that just was not adequate to manage people or not up to that task?

A. Yes.

Q. Okay. So my point is, that to be a supervisor of tellers would not require that someone have the absolute most experience as a teller, but merely that they have the skills that a teller needs to have and to be able to manage people as a supervisor should. Would you agree with that?

A. I agree.

Q. Okay. Were you of the opinion that Mr. Brown did or did not have the skills to be a supervisor?

A. I was of the opinion that he did not.

Q. Okay. Had you ever worked with Mr. Brown?

A. On Saturdays.

Q. Okay. How many Saturdays?

A. And I worked with him on afternoons when he came in at 2:00, you know, occasionally.

Q. Did you work with him every Saturday or was it—

A. No. I believe we worked—I was assigned, like, one Saturday a month or something to that effect. But I worked two Saturdays out of a month.

Q. Okay. So you might have worked with him as many as 24 days and as little as 12 days, then; is that correct?

A. Well, a couple times a month.

Q. Okay. Were you likewise of the opinion that Sylvia Hardin was not—did not have the qualities and the skills that it took to be a supervisor?

A. Yes.

Q. Okay. I take it you considered that you did have those skills.

A. I do.

• • • •

[I Tr. of Trial 184-85:]

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Q. You know or are you aware of the fact that Mrs. Weatherly made application for the two supervisor jobs that came open in 1981, the lobby and the motor bank supervisory jobs?

A. I wasn't aware.

Q. Okay. If you will take as a fact what I am telling you that she did make application, would you have an opinion as to whether or not you were more or less qualified for those two supervisory jobs than Mrs. Weatherly?

A. What year did she leave the bank?

Q. The records, I believe, will reflect that she left the bank about June of 1981, shortly before you did.

I believe that is what the records will reflect; yes, ma'am.

A. Uh.

Q. Let's assume that she was working at the bank in January or February of 1981 and continued at that point in time to continue to work there and she made application for both of those two supervisory jobs.

Would you be of the opinion that you were more qualified for those two positions than Mrs. Weatherly or less qualified?

A. Well, if she had made application during the time that I did, I was less qualified because she had been a supervisor.

Q. Okay. She had in fact been a supervisor for about, oh, a two-and-a-half-year period; is that correct?

A. I assume that you are correct. I am not sure.

Q. All right. And Mrs. Weatherly—was she white or black?

A. She was white.

Q. All right. Now, you are basing your statement that she would be more qualified than you on the fact that she had some two and a half years of supervisory experience?

A. Had she applied for that job.

Q. I am assuming in fact that she did apply.

Now, you know for a fact that she was not given any of those two jobs, were you not?

A. I don't—she wasn't given any of them.

* * * *

[I Tr. of Trial 194-95:]

* * * *

Q. All right. You also testified earlier to the fact that you were talking about the physical layout of the bank building and you referred to the basement, that being the first floor.

That is not really a basement, is it?

A. Which bank are we talking about, the old bank or the new one?

Q. Talking about the new bank, the bank located at Interstate 30 and Beech Street.

A. I think I stated that there was three levels.

Q. Okay.

A. First, second, and I might have called it the basement, but it is the first floor.

Q. There is no basement in that building as far as you are aware?

A. No, there was no basement in the new building.

Q. There are windows on that first floor and there are—

A. Yes.

Q. There is a main entrance to the building, in fact, located there.

A. Yes.

Q. Okay. And that's where the bookkeeping department is located, among other departments?

A. Yes.

Q. Are all the employees on that first-floor level, are they all black or are there white employees down there, too?

A. Mixed.

Q. Probably more white employees than black employees?

A. That is correct.

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[I Tr. of Trial 195-97:]

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Q. Since you have had an opportunity to reflect upon your earlier testimony, have you had any—any other situations of that sort that you have thought of and realized that you might have mistestified or testified selectly incorrectly? Any other situations that you have had come to mind?

A. Well, there's an instance where I misunderstood the question, and as far as qualifications when he asked me about these qualifications about these other people.

Q. Tell me about that.

A. I was thinking that you were talking about when you said "qualifications, had they had previous supervisory experience," you know, as referring to like Patsy, "Did you know; had she applied for the job," and I believe I stated that I was more qualified than they were. I can't really remember what particular people it was but Gayle Leavitt was one of them that was involved. She didn't have any previous supervisory experience when she first got that position that I knew about, but then, you know that she had got from the other job, well, then she would have been more qualified than I because of her previous experience.

Q. Gayle Leavitt was also white, was she not?

A. Yes.

Q. So if I understand what you are telling us now, you are changing your testimony to make it correct to say that if Gayle Leavitt had applied for the—I guess that was the lobby supervisor position in 1981, that you would agree that she was more qualified than you were?

A. Of course.

Q. Okay.

A. And Gayle Leavitt did not get that job, either, did she?

A. No.

• • • •

REDIRCT EXAMINATION BY MR. BRENDER

[I Tr. of Trial 203:]

• • • •

First in 1980, when the jobs first became open you had Richard Burt and then Pat Cullar.

Now, did either of those have prior supervisory experience at the bank in 1980 when those two jobs became open, the inside lobby position?

A. No.

Q. All right.

A. I'm sorry. I'm sorry; I made a mistake.

Richard Burt was bookkeeping supervisor.

Q. At that time.

A. At that time.

Q. All right. But with regard to—that was a position he was promoted to while he was there at the bank; is that correct?

A. Yes. He was promoted to bookkeeping supervisor.

* * * *

[I Tr. of Trial 205-06:]

* * * *

Q. And when you were with him and working with him and showing him the ins and outs of becoming and being a teller, you say his performance, that he had outages and he had various problems in learning the mechanics of the job?

A. Yes. He was very—he was out of balance every day. We had to stay and help him find his outage whenever we worked with him. He was out high amounts of money. In fact, he was relieved of his duties and put into the accounting room.

Q. Who did that?

A. Gary. Gary Shipp.

Q. All right. And how long had he been in a teller position when that occurred?

A. About almost a year, I believe, or a little less.

Q. All right. Now, what about Pat Cullar? To your knowledge, prior to her being named motor bank supervisor, did she have any prior supervisory skills or experience?

A. Supervisory, no.

* * * *

[I Tr. of Trial 207-08:]

* * * *

Q. All right. Let me ask you to look at Patricia Cullar's employment application, Exhibit 2, and look at

page 5 on that of her evaluation, which is dated July 31st, 1981.

Do you see the page I am referring to?

A. The employment history?

Q. Yeah. Look at the evaluation on page 5, the one for the period ending July 31st, 1981.

A. "What accomplishments in the last 12 months." That it?

Q. Right. But look where it says, "In what areas does this individual need improvement?" Do you see that?

A. Okay. Yes. That's No. 3. "In what areas does this individual need improvement?"

Q. Says, "Overall experience in supervising people," with an exclamation point; is that correct?

A. Yes.

Q. And that was some six months after she had been given the job that you had applied for also in 1980; is that correct?

A. That is correct.

Q. All right. And I'll ask you to look at Plaintiff's Exhibit No. 1. Once again, on page 5 of the performance report of Mr. Richard Burt—well, it doesn't have a date on it.

But it's the second one in the file. The first one just says '79. So this one is probably '80.

Do you see page 5 of that one, No. 3?

A. Okay.

Q. And it says, "Mr. Richard Burt apparently needs additional supervisor," or something of that sort. It is kind of written. Mine is hard to read. But apparently, "Needs what is called OJT,"—which I take it to mean on-the-job,—"training in doing some supervisory work;" is that correct?

A. Yes.

Q. Now, to your knowledge was the supervisory experience that was being credited at the bank basically just that. In other words, you were getting on-the-job

supervisory training with these supervisors; they were advancing?

A. That's what—can you repeat the question again?

Q. Well, the people that were making supervisors, from what you were aware of their qualifications, did they have prior supervisory experience—

A. No.

Q. —or were they getting it on the job?

A. They were getting on-the-job training.

* * * *

REDIRECT EXAMINATION BY MR. McGEE

[I Tr. of Trial 229-34:]

* * * *

Q. Okay. Given that prior experienec as the bookkeeping supervisor, is it still your opinion that you were better qualified than he was to do the—

A. Had he not had the supervisory experience, if he had come in just like I did with no supervisory experience, yes.

Q. But that was not the case; he did have that qualification.

And so as I understand your testimony, you are agreeing that he was better qualified than you were for that 1981 teller supervisor's job.

A. Since he had the supervisor experience.

Q. All right.

Do you know—no. Excuse me.

Given the knowledge of Mr. Burt's experience as a supervisor, and assuming that Gayle Leavitt and Patsy Weatherly also made application for that same position in '81 as—Excuse me. Mr. Burt was teller supervisor in '80, and Ms. Leavitt, assuming that they made application in '81 and also Ms. Weatherly in '81 for the lobby supervisor, would you agree that the bank's decision to select someone other than yourself for those posi-

tions could have been based on reasons other than your race?

MR. BRENDER: Excuse me. I am going to object. I think it is speculative what they could have done and didn't do it.

MR. McGEE: Your Honor, the witness has not had any problem in expressing opinions—

THE COURT: What I am trying—I don't think that is quite the right way to ask it.

MR. McGEE: All right.

THE COURT: I'll let you ask, "if that would change her previous opinion that she was discriminated by race and not—

MR. McGEE: Very Good.

BY MR. McGEE:

Q. My question, Ms. Watson, is you have indicated that you agree that Mr. Burt was better qualified for the lobby position in 1980 than you were; and you have agreed that, assuming that Mrs. Leavitt and Mrs. Weatherly made application in '81 for that lobby position that they were also better qualified for that lobby position than you are.

Now then, would you in light of that—those additional facts and assuming that they are true—I am asking you to assume that with me. I know that you have testified you don't know whether they made applications or not, but assuming that to be the case, would that affect your opinion that the bank's decision not to hire you for those two positions was based upon a racially motivated factor?

A. Well, I really don't know how to answer that. I would like to assume—to have my—

THE COURT: Well, you have got to just answer the question that was asked, with that assumption.

MR. BRENDER: I will object to the question because he's putting her—giving her a Hobson's choice. They didn't select either one of these two people. We

don't even know, or haven't heard until to day that they were even in the pool.

THE COURT: This is cross-examination, Counsel.

MR. BRENDER: I understand that, but he's asking her to select out of some people that he says were in the pool and ask her whether they are better qualified than her; and if they were in the pool, would that make a difference based on that fact though they didn't even select them, and I think that's a problem, Your Honor.

THE COURT: I overule the objection.

MR. BRENDER: Fine.

THE WITNESS: Repeat the question now.

BY MR. McGEE:

Q. I will try to make it shorter this time.

A. Okay.

Q. Assuming that, first of all, the decision in 1980 that you saw Richard Burt selected as the lobby supervisor and you were not selected, you have acknowledged that because of his previous experience as a supervisor in bookkeeping that he was better qualified than you are.

Now, would you want to reconsider or would you agree that there is a possibility that factors other than race may have had to do with the decision to choose Richard and not to choose you?

A. No, I wouldn't reconsider.

Q. Okay. Then is it still your opinion that the reason Richard was selected is because he was white, and the reason you were not selected is because you were black?

A. I still maintain that issue, yes.

Q. Now, with regard to the same position in 1981, the lobby supervisor's position, assuming that Gayle Leavitt made the application for that position and that Patsy Weatherly made application for that position, and of course, you made application for that position, you have testified that you agree that Patsy Weatherly was better qualified because of her prior experience as a supervisor and that Gayle Leavitt was better qualified

because of her prior experience as a supervisor. Do you still maintain that the bank's decision not to choose you for that position was because of your race?

MR. BRENDER: I object to this, Your Honor. The fact that these people were even in the pool, they were not selected. The person that was selected was white. She was black. And the Garrison Undergreen versus McDonough and all those decisions have to do with the actual selection, not who they might have had in the pool. And I think he's asking—

THE COURT: I overrule the objection.

MR. BRENDER: —her to speculate.

THE COURT: I overrule the objection.

BY MR. McGEE:

Q. Let me add to that, Mrs. Watson, also, the person who was selected, Pat Cullar, she also had experience also. There's three people who had experience when you had none.

A. Are we talking about—we are talking about 81?

Q. '81, yes, ma'am.

Now, I'm asking you if you would agree that the possibility exists that something other than race led to your not being selected?

A. Based on their—on the qualifications?

Q. Yes, ma'am.

A. No. I don't believe that.

Q. Even though these three people, or at least two of them you have acknowledged were better qualified than you, you believe that the person who was selected or the reason you were not selected is because you were black?

A. Well, I need to clear up possibly what I said when I say "better qualified." They had one qualification that I didn't have. I'll put it that way, instead of saying "better qualified." They had the one qualification that I didn't have, which was supervision, and I didn't have that. I didn't have on-the-job training like they did, and

that was the only thing that they didn't have—that they had that I didn't.

Q. And with those additional qualifications in mind, is it still your opinion that the selection or the reason that you were not selected is because that you were black?

A. Yes.

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REDIRECT EXAMINATION BY MR. BRENDER

[I Tr. of Trial 239:]

• • • •

Q. This on-the-job training that led to supervisory experience on the past—are all of these people we've talked about are all white that had the prior supervisory experience; isn't that correct?

A. Yes, yes.

Q. There had never been a black—

A. No.

Q. —that had prior supervisory experience at that bank, was there?

A. No.

Q. So if you went by that ratio alone, if you said, "All right." We're going to say, "You have to have prior supervisory experience to be a supervisor at this bank," and if they never let a black have it, then there was no way a black was going to be a supervisor at the bank, was there?

A. No.

• • • •

[TESTIMONY OF CLARA B. WATSON AT TRIAL, UPON QUESTIONING BY THE COURT:]

[I Tr. of Trial 243-46:]

• • • •

Q. Now, you said—you kept saying this morning that your increases were small.

Were your increases different, in different amounts, from what other tellers were getting?

A. Well, when I said my increases were small, I remember getting—I believe I got, like, a $15—I know I did at one time—a $15 raise, which was $7.50 on each pay period, which we got paid on the 1st and 15th. And looking at that, you know, in my opinion, it was small.

Q. Well, that's not the issue.

The issue is: Were the white tellers getting $25 for that same pay period increases where you were getting $15? That's what I am interest in.

A. Back during that time, I don't know. That was just a—

Q. Well, that's what I am trying to find out.

Were white people getting $25 day increases or $50 pay increases and black people getting $15 day increases?

A. Well, I understand what you are saying.

I can't verify that. That was a statement that I made; the increases were small.

Q. So you don't know whether your increases were smaller than the white people's or the same as white people or what?

A. No. During that time, no.

Q. All right. Now, you said another thing. You said black people's evaluations were always lower than white people's evaluations.

A. Yes. I said that.

Q. Now, how do you know this?

A. There again, among the blacks, we discussed it, and then there was some whites that I was friendly enough with that we discussed our evaluations, and our different comments on them.

Q. Did you get a copy of your evaluations?

A. Yes.

Q. In other words, were you each given a copy of your written evaluations that you could keep for your own personal records?

A. Yes.

Q. Would you sit down with other people and compare those evaluations?

A. At different times, we did, yeah. There was several of us, yes.

Q. I mean, both blacks would compare with whites and so forth?

A. There was some whites that I knew that we compared them.

Q. In the same line of work?

A. Yes.

Q. During the time—during the teller position or during whatever position you were talking about,—

A. Yes.

Q. —were there any certain areas of the evaluations that blacks were always rated lower than the whites?

A. I could look at the evaluation chart and possibly tell you.

Q. All right.

A. There's one that where it says "quality of work." Now, there were some blacks that were rated very low on this. I happend to be one of those that was rated an 8 on the quality of work.

Q. Were you rated higher than some of the whites that you looked at?

A. Well, there was some that was rated at 9—

Q. Well—

A. —that was white.

Q. That is not what I was asking you.

A. I rated higher in some instances against the whites, lower in others.

Q. All right. In other words, that is what I am trying to find out.

In some areas, did you rate higher than whites did in that particular area?

A. Yes.

Q. And in some areas, whites rated higher than you did in particular areas?

A. Yes. And then when you take the overall total, they had a higher score than we did.

Q. Was that in every case?

A. Well, in the cases that I looked at, you know, just the people that I—you know, that we discussed.

* * * *

CROSS EXAMINATION OF GARY WAYNE SHIPP
BY MR. BRENDER

[I Tr. of Trial 249:]

* * * *

Q. Do you want to state your name for the Court, please?

A. Yes, it is Gary Wayne Shipp.

Q. And whereabouts do you live, Mr. Shipp?

A. I live in Bedford, Texas.

Q. And how are you employed, sir?

A. I am a senior vice-president cashier of Fort Worth Bank & Trust.

Q. All right. And how long have you held that position with that employer?

A. Since 1977.

A. All right. And when did you first go to the Fort Worth Bank & Trust? When were you first employed there?

A. April 1st, 1975.

* * * *

[I Tr. of Trial 256-58:]

* * * *

Q. All right. Now, are there any black officers at the bank?

A. No, there's not.

Q. Have there ever been during the time that you have been there?

A. No.

Q. All right. And then, are there any black directors at the bank?

A. No, there's not.

Q. Have there ever been since you have ben there?

A. No.

Q. And then, are there any blacks that are in supervisory positions at the bank?

A. Yes, there is.

Q. And who are they?

A. Sylvia Harden.

Q. Is she the only one?

A. Yes.

Q. And what is her job?

A. She's currently the assistant motor bank supervisor.

Q. Is she the first black since you have been connected with the bank that's ever been in a supervisory job?

A. Yes.

Q. And the only one; is that correct?

A. Yes.

Q. When was she promoted to assistant motor bank supervisor?

A. Almost a year ago.

Q. And did this job—this assistant motor bank supervisor, in the past, you didn't have an assistant motor bank supervisor, did you?

A. No, we didn't.

Q. When was that job developed or created or—

A. Approximately one year ago. We had an unofficial designation, you know. Someone who the supervisor felt was capable of handling the afternoon duties after the main supervisor left, who was looked at to assist and to help get the things done, get the bank closed up and run it during those hours that they weren't there. We felt it was time with the growth of the bank to designate an official title.

Q. When you made Sylvia Harden—I take it she was a teller before that, I believe is the testimony.

A. Yes.

Q. And you made her an assistant motor bank supervisor.

Did that involve a raise? Did she receive a raise?

A. Not immediately, as I recall. I think after a 90-day period of time she did. Somewhere within 90 days.

Q. Was this 90 days, was this some kind of a break-in period or something?

A. We use that. That's been a standard basically all the time that I have been with the bank, and even prior to that.

• • • •

[I Tr. of Trial 260-61:]

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Q. All right. Now, does Sylvia Harden have as her responsibilities to rate or to evaluate employees?

A. She participates in those evaluations with the supervisors.

Q. But she doesn't actually go in and do the rating and sign the form herself?

A. No, she does not.

Q. All right. Now, so far as the evaluations go, the only people who are actually making the evaluations in the final analysis are still white employees of the bank?

A. Excuse me? I didn't—

Q. The only people who are making evaluations of other people at the bank are white employees; is that right?

A. No, she participates in them. She's just not the full supervisor.

Q. Well, the full supervisor is the one that signs the form and takes responsibility for it; isn't that correct?

A. That is true.

Q. All right. And so even at this point, only the whites are the ones who actually make the evaluation of the other employees; isn't that correct?

A. No, she participates in it. But as far as officially signing forms, she does not do that.

Q. All right.

A. There may be an occasion when the supervisor has been off on vacation and she did that. I can't recall if that is true or not, but that could happen.

Q. Well, in looking through the data that we have received, we don't find any form that has Sylvia Harden's name on it.

A. All right. Then it hasn't happened.

Q. All right. And in fact, during those years that this class is covering, from October 21st of '79 through the present, the information that we have been given would not indicate that any black employees have ever evaluated any white employees. Is that your understanding?

A. Not actually signed the review form, no.

Q. And asside from Sylvia Harden, none of them have had any participation in that process; is that correct?

A. That's true, yes.

• • • •

[II Tr. of Trial 7-8:]

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Q. Now, with regard to salary procedures, just a couple of points. First of all, in each of these ranges from 1 to 9, you have a midpoint salary and then a maximum; is that correct?

A. And also a training minimum.

Q. Okay. The training minimum is the one that you place a person in if they just put them in that grade, I take it, just off the street or something?

A. Normally if the person has no experience in that job, yes.

Q. Okay. In other words, for the most part that would be a situation that you might have where somebody came in, was a new hire, and they had no teller

experience, for instance; you might have a training grade for whatever, 90 days or whatever?

A. Previous banking experience. If they didn't have any previous banking experience, chances are they would come in somewhere between the training minimum and the minimum.

Q. All right. So ordinarily somebody in one of these grades would be somewhere between the minimum and the maximum during this period of time except in training; is that correct?

A. That sounds true, yes, that sounds true.

Q. All right. Now, and you—in the position that you are in, you have the ultimate say-so in what the salary would be for anybody who is a new employee, anybody who is a new employee and just coming in the bank; is that correct?

A. I have the ultimate responsibility for the personnel area.

Q. Okay.

A. I don't set those salaries.

Q. Well, page 2, for instance, in the paragraph B where it says new employees, the second paragraph under that section, says, "To insure equity in the integrity of the salary administration program no salary offer shall be made to a prospective employee without agreement between the supervisor of the position and the officer in charge of personnel."

A. That is true.

• • • •

[II Tr. of Trial 10-11:]

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Q. Okay. Now, if we look on this exhibit 33 where we have salary increases, page 3 at the top, it says, "No salary increase will be made effective without the approval of the salary committee and the officer in charge of personnel."

Once again, the same responsibility. And up until September of '83, I take it that was your responsibility

entirely, and now it is the responsibility of the person who works directly under you; is that cvorrect?

A. Not entirely. The salary committee, which is made up of three people in the bank—

Q. All right.

A. —which includes the officer in charge of personnel.

Q. Okay. Well, it says, "without the approval of the salary committee and the officer in charge of personnel." So you had authority separate and apart from the committee, did you not?

A. No, I did not.

Q. Who were the people on the committee that would set there salaries or have some authority to?

A. Since the inception, it's generally been the president of the bank or the executive vice-president of the bank—

Q. All right.

A. —and the officer in charge of personnel and the senior operations officer.

Q. Okay. And who are those people at the present time? We know who the president is, but who are the other persons?

A. At the same time, I am senior operations officer. Helen Brister is officer over personnel.

Q. All right.

A. And Jim McKnight, James McKnight is the executive vice-president.

Q. And how long has he been on that committee?

A. Approximately two years, two-and-a-half years.

Q. Okay. And you have been on the committee through the entire—or you have been either the officer in charge or on the salary committee througout the entire course of this class, have you not?

A. That's true.

• • • •

[II Tr. of Trial 14-19:]

Q. You were the person who ultimately had to sign and approve, as the personnel officer, the percentage

increase in pay that was given to each of these employees who was reviewed on the nonsalary—the nonofficer salary review worksheet, were you not?

A. That's true.

Q. And you had the—you had the option of changing the evaluation score and changing it up or down as you saw fit, did you not?

A. No, sir, I did not.

Q. Did you on occasion exercise that authority that you had to change the percentage increase that a person would receive?

MR. McGEE: Your Honor, I believe the witness said he didn't have that authority.

BY MR. BRENDER:

Q. You testified you did not?

THE COURT: Yes; he said he did not have that authority.

BY MR. BRENDER:

Q. Well, you've previously testified that you did, had you not?

A. When did I testify?

Q. You testified twice that you were the one that ultimately had responsibility for this and if you thought that employee was not performing as rated by the supervisor, then—

A. Let me say this.

Q. All right.

A. If, as a member of the committee, if the supervisor comes to the committee with a review form that is completed and some of the ratings I have personnal knowledge of that appear to be overrated or underrated, whatever, then we discuss those. But I cannot recall me being the one that has actually said, "Change the review form."

Q. Well, by discussing them, you mean you could tell the supervisor you think that person is overrated or that person is underrated and they should make some change in the evaluation.

A. Based on the examples that they give and the opinions that they give about that employee, if they don't meet the rating criteria, then we discuss either that they've misrated them or the examples that they have given do not fit the rating.

Q. All right. What you are saying, then, is that you just don't take it upon yourself to change these?

A. No.

Q. But you certainly do have—you are the one that finally signs this and finally approves it and their rating has to finally meet with your approval; is that correct?

A. If it meets with the committee's approval and if I am the officer over personnel or had been, then I am required to sign the form.

Q. All right. Well, are each one of these taken to the committee, or what is the flow?

A. This is the last product that we looked at. The first thing we do is go through the complete review of each employee, the review form.

Q. Uh-huh.

A. Stem by step. Example by example. And if we have knowledge that maybe the ratings don't look adequate, that they don't look either—they don't look like the examples that we have rated them the way they should be rated, then we discuss those points.

That's not a standard thing that we discuss, changes, but it does happen.

Q. Well, you are not telling the Court that every one of these 80 employees who has a review is actually—that you're actually looking—that your committee is actually looking at every one of these forms. They go to your office first, do they not?

A. No, sir, they do not. They come in front of the committee. I don't look at them at any time prior to that committee meeting.

Q. All right. And then, of course, you have been a member of this committee throughout the time we are talking about.

A. That is correct.

Q. All right. And you saw one example earlier when you were here of an evaluation on Clara Watson that was changed and reduced, did you not?

A. That is correct.

Q. Okay. And one of the persons—and you are the only main—you are the only person whose signature ever appeared on any of these sheets; is that correct?

A. That's true.

Q. All right. And in fact, on the one we're looking at right here, this Linda Brimer, this one was actually increased over what the supervisor had—had initially evaluated here at, was it not?

A. It's increased over the point rating, yes.

Q. All right. And down at the bottom it says, "Additional award for extra work and excellent quality of job done." Is that correct?

A. That's what it says, yes.

Q. And that is your handwriting, is it not?

A. Yes.

Q. Okay. It is not in the committee's handwriting or anybody else, the president's handwriting or anyone else.

THE COURT: Let me get this clear, now:

Do you make any of this—I mean, is this done in a committee or is it done by you individually?

THE WITNESS: This is done in a committee, Your Honor.

THE COURT: Do you make any sign to—or did you sign any paper that—because you approve it or disapprove it or because the committee approves it or disapproves it?

THE WITNESS: It is because the comimttee approves it.

THE COURT: What kind of vote is required in order to increase, decrease or what?

THE WITNESS: It's just a general overall opinion of whether the facts are right or wrong.

THE COURT: Well, I mean, do you—do all members of the committee agree before any lowering or raising—

THE WITNESS: Yes, sir.

THE COURT: —has been accomplished?

THE WITNESS: Generally it is that, and occasionally there will be a majority that says, "Yes, I know about it" and one will say, "I am not aware of that," if we change something. But we talk about it at great length and generally everyone agrees.

THE COURT: And do I understand that each and every employee is reviewed by this three-member committee?

THE WITNESS: Yes, sir.

THE COURT: Okay. I just want to be clear on that. I mean, there's been kind of going—I just want—All right.

BY MR. BRENDER:

Q. All right. Of course, you being the personnel officer, I take it that your word before that committee is given a little bit more weight than some of the other people who are not in charge of personnel. That is what your job is, isn't it

A. Not unless I have knowledge of their performance.

Q. Well, your job as personnel officer is to know if somebody not performing well, or the complaints about a person's performance are going to come to you as the personnel officer not, not to the president of the bank, are they?

A. Well, occasionally it happens that way but not often. They usually come to me.

Q. All right. That is the chain of command, is it not?

A. That is right.

Q. In other words, ordinarily the complaints would come to you and you are the one who would then take

that to the committee if somebody would say, "This person is not performing very well," but the supervisor is rating them very high or something of that sort.

A. That happens occasionally.

Q. And I take it it is rare, if ever, that the committee goes against your recommendation if you say, "This person is performing outstanding work, doing outstanding work and they deserve a little bit more than the supervisor has given them," I take it, they are inclined to agree with you, are they not?

A. I don't normally make that recommendation. The supervisor makes that recommendation.

Q. Well, I am talking about if you are going to change one of these from what the supervisor has done.

A. If during the discussion we see a rating that is not rated properly, then we discuss it.

• • • •

[II Tr. of Trial 20-21:]

• • • •

Q. And if you have one of these that comes through and Linda Brimer is rated a 70, and you are going to be the one more than likely who is going to know that maybe she ought to be an 88 instead of an 70, because you are the officer in charge of personnel.

A. Well, that is not true. The supervisor should know that a lot better than I should.

Q. Well, I am talking about when it gets past the supervisor to you, the supervisor has given you this sheet with the 70 on it, and the question is: Are you going to approve that 70, which is your prerogative, or are you going to change it?

A. If the rating appears to be proper, I have no questions about it.

Q. By that I mean, the question is: Who is going to determine? Who is the one most likely to know whether it is proper or not? And that is going to be you, isn't it?

A. The supervisor. The supervisor is with those people on a day-to-day basis. I don't do that.

Q. All right. But you are the one who has to consult with the supervisor, according to the salary plan, every time there's a salary raise or increase; right?

A. Because I'm part of the committee, I do that.

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[testimony of Gary Wayne Shipp at trial, upon questioning by the Court:]

[II Tr. of Trial 23-26:]

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THE COURT: Tell me how a review session operates.

THE WITNESS: Okay.

THE COURT: Just start at the beginning and tell me how it operates.

THE WITNESS: Okay. At a given time we go ahead and set salary reviews, and prior to that the supervisors receive their review forms, like two weeks prior to the committee meeting being set.

They complete those reviews. They come individually to the meeting and present those reviews to the salary review committee, which is the executive vice-president, officer in charge of personnel and the senior operations officer.

THE COURT: Now, has the members of the committee seen that review sheet prior to the supervisor appearing at the meeting?

THE WITNESS: No, sir, not as a group.

Now, it could be that—let's say the senior operations officer, let's say there's a problem with an employee's review. That supervisor, because of the answer, that person might go and say, "I'm having a problem on this area right here." So that person may have seen the review but not in total sense generally. And nothing is made—no decision is made at that point. It comes in front of the committee to be presented by the supervisor.

The COURT: In other words, you have got your three-member committee—

THE WITNESS: Yes, sir.

THE COURT: —and the supervisor present; and the supervisor, does she go through them name by name?

THE WITNESS: Yes, one at time.

THE COURT: Sheet by sheet.

THE WITNESS: Yes, sir.

THE COURT: And you discuss them one at a time.

THE WITNESS: Yes, sir.

THE COURT: How many times a year is this done?

THE WITNESS: It is done every month.

THE COURT: It is done every month.

THE WITNESS: Yes, sir.

THE COURT: Does it affect all employees every month, or does it just affect those employees that the supervisor is making some recommendation concerning salary about?

THE WITNESS: Your Honor, there is a—when we set this up in 1979, there became a standard review date for everyone at that time. It was either their anniversary date or the date of their last increase, and it's gone forward since then. In other words, every employee of the bank knows when they are going to get their performance review, and the supervisors know. And we send out the forms on the employees that are receiving their review that month, and those are the ones that are reviewed.

THE COURT: In other words, it's their anniversary date.

THE WITNESS: Yes.

THE COURT: So it is just those that have an anniversary date each month that you are reviewing?

THE WITNESS: Right, or it could be 12 months from the date of their last increase, which there are times when it varies from their anniversary date.

THE COURT: All right. I'm clear.

* * * *

CROSS EXAMINATION BY MR. BRENDER

[II Tr. of Trial 31-32:]

* * * *

Q. Okay. And when you—when Richard Burt became the lobby supervisor in 1980, what grade was he?

A. In 1980, that was a nonexempt position. It was an officer's job, and they did not have grade ratings.

Q. Was it an officer's job by the person that held it before him, or was he made an officer?

A. It was an officer's job for a number of years prior to him taking the job.

Q. And then when you named Pat Cullar to that position in 1981, about January or February, both of these dates. I get them confused sometimes, but in any event, we are talking about the same time, almost a year later. How was the job rated then, or graded. Once again, the inside lobby teller job?

A. The inside lobby teller supervisor job?

At the time that that job was going to become vacant, as I recall, we looked very much at the position. Because over the years the job had changed. And not, you know,—the job was going to be not responsible for other things such as purchasing which it had been in the past, and some other duties that the—the job had just grown to a point that they didn't—they needed to be doing supervisory, teller supervisory work only. And as it rated out, it did not—it was not an officer position.

Q. It downgraded to a rated—or a graded job; is that correct?

A. Basically that is right, yes.

Q. And what grade job was it? What number grade was it?

A. It was an 8 or a 9. I don't recall.

Q. All right.

A. I think it was a 9.

Q. All right. So when she took the job, she was not an officer?

A. That is right.

Q. In 1981; is that correct?

A. That is right.

Q. And the position became a regular graded job?

A. That is right.

Q. Even though it had supervisory responsibilities, apparently; is that correct?

A. That is true.

* * * *

[II Tr. of Trial 49-50:]

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Q. All right. And does your—what percent of these people, how many of these people are you actually interviewing? Are you interviewing some?

A. Actually interviewing, I have only interviewed the people that go to work directly for me. We're talking about a couple people in the last two to three years.

Q. So you are not interviewing these people directly?

A. That is right.

Q. But you are one that makes the final decision on whether they are hired or not, are you not?

A. No, the supervisor does that.

Q. Well, you have testified previously that you were the one, though, that consulted the supervisor. The supervisor made the recommendation, but you were the one that made the final decision; did you not?

A. Ultimately I am responsible for the personnel or have been for the personnel department, personnel area.

Q. And who they hire; right?

A. I did testify to that but I want to add to that, it wasn't complete.

Q. Pardon me?

A. That testimony was not complete.

Q. So you are changing your testimony in that regard, too.

A. I am adding to it because it wasn't complete. I do not select the people for the supervisors. They do their own selections.

The only time—what I meant about consulting with those people, is that the person in the personnel area of our bank basically has the responsibility for seeing that the people are qualified from a basis of the reference that they give. We have to check those and we do credit checking. And basically, that is what the personnel area does.

Now, also, we have those salaries ranges that the people are hired in, and generally the applicant specifies what kind of dollars that they're looking to come to work for. And the supervisor finally decides which person they're going to hire, and they know what salary ranks that they can—that they are dealing with. But when it comes to the, actually discussing—we look at the salary to make sure it fits the guidelines. But I do not make those choices for them, and I know my testimony sounded like that, but I just don't do that.

* * * *

[II Tr. of Trial 53:]

Q. All right. But as is, I suspect, usually the case with anybody who has ever hired an employee before, frequently they are not always that clear cut; there are several things, several people in competition and they have got good points and bad points and the question is whether you want this person or that person. You help them make that decision, do you not?

A. No, I do not.

Q. You tell them, "Make a decision and bring it to me?"

A. That is correct.

Q. Isn't that what you are saying now, anyway?

A. That is the truth.

* * * *

DIRECT EXAMINATION BY MR. McGEE

[II Tr. of Trial 76-77:]

* * * *

Q. All right. Mr. Shipp, earlier you were discussing to the Court the method in which thhe salary review committee evaluates—or reviews the evaluations of employees.

A. Right.

Q. I think you started, and I don't know—I'm not sure if you went all the way through, but let me bring you up to where I think we stopped.

As I understood your testimony, the supervisor receives the evaluation forms some two weeks approximately prior to the evaluation—or to the review committee meeting; is that correct?

A. That's correct.

Q. And that supervisor then prepares an evaluation of that employee, and does she come to your office and sit down at a computer and get you to help her fill out the evaluation, or does she substantially or entirely do that by herself?

A. It's the supervisor's job to complete them, based on their review of that employee—

Q. All right.

A. —mine or anyone else's.

I did mention that occasionally if there's a problem with an area and they need some help, you know—they're not just—maybe they're not sure just how to—how that rating should be scored, occasionally that would happen.

Q. Okay. Now, was that a routine matter or a very infrequent situation?

A. That's very infrequent, and they usually go through their immediate supervisor—

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[II Tr. of Trial 81-83:]

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Q. Now back to this evaluation committee, we've reached the point where the supervisor has received her evaluation form. And these are standardized forms that all the supervisors—the same form for all employees, all nonexempt employees. And he or she then either takes it home or sits down at their desk, and anyway, fills out the form on a particular employee.

What happens next with that evaluation form?

A. The next thing that happens on the day of the review committee, depending on what supervisor comes first, they come in front of the committee, and we actually go fact by fact, criteria by criteria, looking at each point that they've rated them and the reasons that they justify for rating them that way.

Q. Are copies made of the evaluation and handed to each of the members of the committee?

A. No, it is not.

Q. All right.

A. It is available to go look at, but we have a blank copy we work from.

Q. For instance, Mrs. Crow is a supervisor in the new accounts section, I believe.

Would she stand up before the committee or sit with the committee and say, "All right, my employee is Mrs. Smith."

"On the first item, which is quality of work," let's say, "I have evaluated her as an 8."

Is that the way it is customarily done?

A. That is right.

Q. All right.

A. Then she proceeds to tell us why she rated her that way.

Q. All right. And that basically follows the examples they have written down beneath that?

A. Correct.

Q. All right. Let's suppose in the process of reviewing Mrs. Smith's evaluation that some member of the committee either doesn't—would disagree with Mrs. Crow's evaluation of Mrs. Smith or just doesn't understand how she came to an 8 in—and maybe the examples don't seem to support it.

Is that when the committee then would make some input into the review process?

A. It's an informal committee. I mean, we ask if an occasion—

Q. You don't have to raise your hand and get recognition from anybody or anything?

A. No, not at all. We are free to speak.

And whoever that person may be, says, "Hey, I have a problem with that because the examples don't fit," or, "I know of an instance," but that is very rare. But, "I know of an instance, you know, where this person has done thus and so." And I wonder, does that alter, you know, your judgment. The supervisor generally knows best about what their employee's performance is.

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(II Tr. of Trials 83-85:

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Q. Well, let's go specifically to the situation with Mrs. Watson's evaluation that you have there in front of you. I believe her '79 evaluation where a figure was changed, I think on item 11, is reduced from 10 to 8, I believe; is that right?

A. Let's see. Under 11, yes.

Q. All right. What is item 11? What is that entitled?

A. That is—the criteria in friendliness and courtesy. In other words, the way that the employee—what kind of attitude and attention and the personality do they have towards all other employees, towards the bank

customers, the supervisor that supervises them and any other persons that they may supervise.

Q. All right.

A. Their general overall attitude.

Q. All right. Mrs. Watson's supervisor at that time was Gayle Leavitt; is that correct?

A. That's correct.

Q. Now, do you remember—first of all, were you present at that committee meeting that reviewed that particular evaluation of Mrs. Watson?

A. I am sure I was.

Q. All right. Do you know or do you recall the circumstances that led to that figure being reduced from 10 to 8?

A. Yes.

Q. All right. Tell the Court what those circumstances were.

A. Well, in any of these ratings, the top rating means there's just little room for any improvement whatsoever. You know, the person is basically beyond getting any better. And Clara had a little bit of a problem with some of the employees, Lenna Gray specifically. And you know, if there's a problem getting along with any of her other employees or the supervisor, then, you know, there's no way—apparently the committee decided that is not perfect.

Q. Okay. Did the committee instruct Mrs. Leavitt to reduce that from 10 to 8 at that point?

A. I do not remember how that goes. We do not instruct them to change them. If the supervisor disagrees —again, they know their people better than we do. If they disagree, they have more to say in that meeting, really, than we do.

Q. The reduction of that point score from 10 to 8 reduced her overall point accumulation by two points, and you caused her to go to a lower percentage increase; is that correct?

A. That's correct.

Q. How much of an increase reduction was that or how much less increase did she receive?

A. Actually, the increase amount was about a 7.3 percent, and had that—if the 10 had been correct, and she had been rated the 72 points, it would have been an 8 percent, which amounted to $3.80 per month difference.

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[II Tr. of Trial 85-88:

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Q. All right. Back to our hypothetical situation with the review committee.

The supervisor has presented that, and in a routine situation, the committee listens to her presentation or his presentation.

And you then—what do you do next?

A. Okay. Basically, the—normally, the committee generally agrees with the supervior. Like I say, they know and they are able to rate these people better than we are. Basically, that is the end of it. The points are added up. The supervisor has already done that. We just verify that they are added up correctly, figure their increase, and that's basically how it goes.

Q. Is the review—the worksheet, the sheet where the points are totaled and the actual increase is calculated, is that done in advance or is that done while the committee is meeting?

A. It's either way. The supervisor in a lot of cases will go ahead and figure it—

Q. Okay.

A. —and come before the committee.

That particular form does not go back to the employee. The review form goes back with all the documentation on how the person is rated.

Q. And there's been some comment about the fact that many of these evaluations were signed by you as personnel officer.

A. Yes.

Q. All right. Does the personnel officer—does the personnel officer sign that review if he chooses to ignore the recommendations or the comments of the salary review committee, or is that only with their conference?

A. It's only with the conference of the committee.

Q. Okay. Does the personnel officer have any greater authority with regard to increases than the committee or any other member of the committee?

A. All salaries are set by the committee.

Q. Okay. The—

There are some circumstances where there are changes or additions made to the person's—well, the increase they would be entitled to, just based upon their evaluation points.

Typically, can you characterize for the Court why a person would receive a greater salary increase than the evaluation would otherwise justify them to?

A. Well, there are several things. You know the policy that we work under is the salary administration. The policy that we work under is by and large the rule, but generally if an employee has during this period of time, has changed duties significantly, normally—or things that appear to be significant or they have gone from, let's say, a teller grade 5 to a, let's say, a new accounts clerk grade 6, then there's consideration given within the policy for an adjustment over and above their performance review rating.

So there's one instance that that can happen.

Q. Okay.

A. Also, if—you know, there have been times that come review time, we have noticed that an employee because of current salary ranges within their job grade or because of upcoming, like in December, those grades are changed, usually every year, that the person has fallen below the minimum in the range.

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[II Tr. of Trial 88-89]

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A. In addition to that, there are—occasionally the supervisor will come in with the review form, will go through it and they will recommend, because of for some reason that the person receive additional pay. Maybe they've—I don't know specifically what reason.

You know, they have been going over and above their normal job duties to do certain things or maybe they've changed but not dramatically. You know, not a total new job or anything like that.

And the supervisor recommends that we do X, you know, give them an increase maybe above that stop. That's not—that doesn't happen very often but it does have and they have that flexability.

Q. Would the committee itself make thhe same type of recommendations for increase?

A. No.

Q. Okay. Why is that?

A. Well, it's just not our job to do that.

Q. Okay.

A. It is the supervisor's job. If they feel like the employees should have something different than the review.

Q. As you are aware, Mr. Shipp, from sitting here in the courtroom these last two days, the allegations are that you are the one that does all the hiring, sets all the policies of the bank and ultimately sets all the salaries and increases that all of the employees receive.

Is that a fact?

A. That's not true.

* * * *

[II Tr. of Trial 92:]

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Q. Now, let's assume that there is an opening and it so happens it is in the teller department and I say, "Well, I don't have any experience but I would like to work in a bank, and I think I would make a good teller.

You know, I have had some opportunities where I have at least dealt with money before, so I think I am somewhat qualified or can learn."

Would I be granted an interview at that point?

A. Well, if the supervisor and the—if the supervisor has determined that they need someone with experience, probably not.

Q. Okay.

A. If it is a situation where the supervisor feels like that they can take someone and put them in a position to learn, then possibly. But generally that's—if it's a situation where they can take time to train these people, someone within the bank has already applied for and gotten that job: You see what I am saying?

[II Tr. of Trial 95-98:]

* * * *

Q. Mr. Brender was questioning you about the effect of tenure of an employee on that employee's salary.

Is that, in your experience at the bank, is that the single most important factor that affects an employee's salary?

A. Not at all. The main thing that is going to affect their salary is; number one, the initial salary at which they come to work for the bank at. And subsequently from there, their performance reviews that their supervisors do to determine what kind of increases they get. Tenure really, really does not enter into it.

Q. You have some employees in the bank who have been tellers at the bank for a number of years, do you not?

A. That is correct.

Q. I think one probably has in excess of 20 years experience?

A. Yes.

Q. Or tenure, I should say, not experience but tenure.

A. Actual tenure, yes, Adda Addington; and Mildred Day has 25 years of experience. Not that much tenure.

Q. Is it possible that even considering all that tenure that these employees have that someone who comes to the bank as an applicant for a job as a teller who has, say, two or three years experience at Interfirst Bank or somewhere else here in town and has demonstrated that they have some knowledge and experience as a teller, they would come in at approximately the same salary that Mildred Day or Adda Addington have achieved?

A. That is possible, yes.

Q. Is that not unusual?

A. We don't—as a general rule, the personnel department, you know, shouldn't allow, if they can control that—a person—unless they have the exact same amount of experience, they might come in at near or the same as.

Q. Okay.

A. That's possible.

Q. Do you—does the—or the applicant indicate what salary he or she is willing to accept in some cases?

A. Generally they do.

Q. All right. And does that have any effect on what their initial salary is?

A. Absolutely, yes. Certainly does.

Q. I assume that if the bank has the opportunity, it would try to hire all employees at the lower end of the range just for pure economic reasons?

A. Well, we're all in business for one reason: That is to make a profit. If—unless it's completely out of the range, yes. If they say, "I'll come to work for 800," and that is the low end of the range and they agree to do that, then, yes, we're going to do that, probably every chance we get.

Q. And I suppose also if I came into you and I said, "I would like a job and here is my experience," and you say, "Well, we want to hire you. How much money do you want?" And I say, "Well, I'm open. I need a job."

Do you say, "All right. We're going to pay you the top of the range," or do you try to—do you have a—

A. I'm sure that is not the case. We would not pay them top of the range. You know there's a range there.

And based on whether they have any experience in that job is generally how we start looking at them.

Q. All right. Does the person's initial grade affect what their salary is at a given time?

A. Yes. It will affect their starting salary, and could affect their maximum salary. Because there's a range there from minimum to maximum.

Q. If I come to work at the bank as a grade 8 employee and I've had two or three years experience at another bank doing the same job and you hired me in, is it likely that I may be making a greater salary than someone who is a grade 5 and has had 10 years tenure with the bank?

A. It's very possible.

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DIRECT EXAMINATION OF
THOMAS R. MARSHALL BY MR. BRENDER

[II Tr. of Trial 103-04:]

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Q. Would you state your full name for the Court, please?

A. Yes. I'm Tom Marshall.

Q. And whereabouts do you live, Tom?

A. I live in Dallas, Texas.

Q. And how are you employed?

A. I'm employed at the University of Texas at Arlington.

Q. And in what capacity?

A. I'm a Professor of Political Science.

Q. And how long have you been so employed?

A. Seven years.

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[II Tr. of Trial 104:]

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And prior to assuming your position at the University of Texas at Arlington, where were you employed or how were you employed?

A. I was a graduate student at the University of Minnesota.

Q. And in what field?

A. Political science and research methodology.

Q. All right. And in that connection, you received your undergraduate training where?

A. At Miami University in Oxford, Ohio and my Ph.D. at the University of Minnesota.

Q. And what was the field or the field of study or in what area did you receive your Ph.D?

A. Political behavior and research methodology.

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[II Tr. of Trial 105-07:]

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Q. Tell the Court briefly and not to repeat what is in the resume, but what experience and what work have you done in the area of statistical analysis?

A. Okay. I have taught some statistical courses at the university, and I have also done some survey sampling and some consulting for several groups; among them were some law cases, which date back several years. I think they are listed on that resume.

Q. All right. And in that connection, do you, in the course of gathering evidence as a government professor, do you have occasion to use statistics and statistical analysis in—I say government, political science—in making analyses for the various work that do you in that capacity?

A. Yes, sir, quite a lot of time.

Q. What type of courses have you taught, statistical courses at the University of Texas at Arlington?

A. They have a research course. They have a computer methodology course, both at the graduate and un-

dergraduate level. And then in the behavior courses, students normally do some statistical work with voting behavior studies or other kinds of studies.

Q. All right. In addition to statistical analysis, you have also done sampling and sampling techniques and things of that sort for

A. Voter.

Q. —voter studies and that sort of thing; is that correct?

A. Yes, sir, for voter studies and surveys.

Q. Okay. And in that connection, do you perform the usual and customary tests of statistics and statistical matters with regard both to the social sciences and to the analysis of data within the social sciences?

A. Yes, sir.

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[II Tr. of Trial 114-19:]

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Q. Okay. Now, Tom, with regard to going back, now, and looking at both Plaintiff's Exhibits 9 and 10, it appears to me that the number of—of blacks who are—Basically what this shows, as I understand it, are what are called rates of hire—is that correct?—or rates of offer in the case of the offer.

A. Yes, sir.

Q. All right. And what we're examining is, we're looking at the total number of applicants that are coming through and we're dividing them up by race. So we are looking at the percentages of black and the percentages of white, and then we're saying: All right, what percentage of those that are black that are applying are actually getting hired and what percentage of those that are white that are actually applying are getting hired; is that correct?

A. Yes, sir.

Q. And by looking at applicant flow data such as this, you are able to get a better picture of what is actually happening in the bank than if you were simply to ex-

amine the total population. Say the total population shows 20 percent of the population of the city of Fort Worth is black and therefore, they must have had 20 percent applicants, or the county is 15 percent, and therefore they should have had 15 percent applicants. Here you have the actual applicant flow data, and whether they in their process, for whatever reason, are either accepting or rejecting these people; is that correct?

A. It is a more specific figure, yes.

Q. All right. And now with regard to these rates, what is the rate at which those blacks who are applying are actually hired by the bank?

A. 3.5 percent of the blacks who applied to the bank were hired. 14.8 percent of the whites who applied to the bank were hired.

Q. All right. So the difference is about four to one, about four times as many whites who applied—or the hiring—the rate of hiring the whites is about four times higher than the rate of hiring the blacks; is that correct?

A. Yeah, you could look at it that way.

Q. And when you look at it in terms of officers extended; in other words, offers that were extended whether they were actually accepted or not, what is the black rate at which offers are extended?

A. Okay. Are we on table—

Q. Table 10, now, Exhibit 10?

A. Exhibit 10?

Q. Uh-huh.

A. Okay. If you look at it that way, you see that the bank made 95 offers, of which 6 percent were to blacks, and that compares to 21 percent black in the applicant pool.

Q. Now, looking at Exhibit 10, I think there's six blacks that were given offers. Am I correct?

A. Okay. That is 4.2 percent, or six of 144 blacks who applied got an offer.

Q. Okay. And then how many whites received offers?

A. 16.7 percent of 533 who made an offer.

Q. Okay. So, once again, what we've got is about the same ratio of whites to blacks with regard to their ratio of offers. It is about the same, about four to one; is that correct?

A. Yes, sir. That is right.

Q. And, now, what type of statistical test would you use or analysis to determine whether or not the race of the applicants may be a factor in the figures that you are getting for the rates of higher hire, knowing that the rates of hire are quite a bit higher, four times higher for whites than blacks.

Is there some statistical test you can use to find out whether that is significant, or whether that is statistically significant?

A. Yes, sir. You could, of course, just look at it and look at the table by itself, but there is a test, it is a chi-square test. It's a very simple test which just tells you whether the numbers which you get in the cells or in the parts of the table are unrelated or related to what is in the margins of the table. And the interpretation of the chi-square is, what chances are there that this distribution could have occurred, were not some other factor operating.

Q. All right. With regard to the chi-square analysis, is it used, is it standard or used—is it used frequently in the social sciences to determine the validity of certain conclusions made by analyzing statistics?

A. Yes, sir. It is commonly used.

Q. And what is the significance level that social scientists generally accept as being a level that—at which they feel that the data is from a statistical standpoint significant?

A. Okay. There isn't any single point. If the population sample were quite small you might look at point 1. In most cases people look at .05 level. You could also look at the .01 level, but the .05 is the most commonly used one.

Q. And that means that this would not occur at chance greater than five times out of a hundred; is that correct?

A. Yes. What it means is that the chances of this distribution occurring were, were one of the variables not operating, is less than five in a hundred.

Q. All right. Now, looking now at Exhibit 9, you performed a chi-square analysis on that exhibit, did you not?

A. Yes, sir.

Q. And what is the significance level of the chi-square analysis there?

A. The chi-square significance at .0001, or one in 10,000.

Q. All right. And if we were then to state what that exhibit shows—let me see if I can state it correctly—that if the Fort Worth Bank & Trust was not considering race in their hiring of potential applicants, what are the chances or the odds that this distribution that we have seen, the number they have actually hired out of the persons that have actually applied, would occur?

A. It's not very probable. The probability of getting that few a number of blacks or that low a percentage of blacks actually being hired vis-a-vis the whites is not just very probable. The chances of that happening just by coincidence are one in about 10,000.

Q. All right. So there would only be one in 10,000 chance of getting this kind of distribution, simply a chance, were it not in this case the race variables entering into it; is that correct?

A. Yes, sir.

Q. Is that—is that the type of probability that social scientists would consider to be a very, very distant probability in the real world?

A. Yeah. As the chi-square probability goes down, what it means is your finding is more and more important and it can't be explained just by chance. So as the chi-square probability goes down from .01; that is, one in 10, or one in a hundred to one in a thousand to one in 10,000, what it is saying is that basically the chances

that you just could have come across this table without any extra something operating are just getting more and more remote. Hence, it's a stronger and stronger finding.

Q. In other words, there is the stronger finding than the probability of .01 or .05?

A. Yes, sir.

Q. In other words, quite a bit stronger finding; is that correct?

A. Quite a bit stronger.

Q. All right. When you applied the chi-square analysis to the offers in Exhibit 10, you received the same kind of statistical significance; it is one in 10,000 or .001; is that correct?

A. Yes, that is right.

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[II Tr. of Trial 125:]

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Q. Tom, I believe where we were, when we broke for lunch, was with the Exhibits Nos. 11 through 21, and these exhibits showing basically this same—derived from the same data, the same applicant flow information and broken down by positions.

A. That's right.

Q. And the—with the understanding that where it says "larger pool," that was simply where you took into account those who had "open" on their applications apparently, and on the applicant flow log and where it didn't say "larger pool," than it did not include those categories; is that correct?

A. Yes, sir.

Q. All right.

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[II Tr. of Trial 126-28:]

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A. Basically what this does is not look at the whole pool altogether of applicants but break them down by

the kind of positions they applied for. You could apply for a secretarial position, a teller position, kind of a catchall clerical position and a—basically a blue-collar or nonprofessional position.

What we did is, we looked at the percentage of white and blacks who had applied and gotten offers in each of the several different areas and we looked at it by the strict test; that is, the test in which you specifically apply for a position, and also by the loose test, which includes those who put "open" on their application.

What we find is that in each of these instances white people, white applicants were more likely to be hired than black applicants. That is true, I believe, for each of these exhibits.

In several of these exhibits, that difference provides a statistically significant result at .1 or .05 or .01 or better.

Q. All right. And in some of them you have a small number, a small sample, do you not?

How does that affect the significance on those?

A. That is correct, when you have a very, very small number. Now, back here in Exhibit 20, these are the people who applied for messengers, maintenance and mail clerks, the nonprofessionals. There weren't very many. Only 14 people applied apparently for those. They hired two whites; no blacks. Still, this isn't going to be a significant result. The numbers are just too small.

Q. All right. But are the percentages, the rates of hire of whites in every instance greater than the rates of hire for blacks?

A. Yes, sir, they are in each instance.

Q. All right. Now, I want to go on, then, to Plaintiff's Exhibit 22, and ask you what—actually, we're going to take this group of exhibits again, 22, 23-A and 23-B; and I'll ask you, starting with Plaintiff's Exhibit 22, what that exhibit shows with regard to the hiring of employees at the Fort Worth Bank & Trust?

A. Okay. This class goes on for over, I guess it is, four years. And during this time period, there were certainly different cycles in the bank's hiring. At some time they hired a large number of their applicants. At other times, perhaps because of the recession or whatever, they hired very few.

So what I was doing here was looking for the possibility that they hired few blacks because blacks applied at the wrong times. For example, if blacks applied when they weren't doing much hiring, then it might be a natural result of this fluke that they hired few blacks. So what I did, was I broke it down into nine six-month periods, beginning in the first and generally running from October through March, and then subsequently April through September.

So you end up with nine six-month periods.

And in five of those, they hired over 10 percent of their applicants. In four of those 10-month periods, they hired under 10 percent of the applicants. And that's what this table reports. It reports the numbers of whites who applied when they were hiring very few applicants and the number of blacks they did, and then it reports the number of whites who applied when they were kind of going full-gun there and hiring a lot of people, more than 10 percent of the people who applied, and similarly with blacks.

Q. All right. What does that table show, because the chi-square shows it is .37. What would that indicate?

A. The chi-square indicates that blacks and whites did not apply at significantly different times, vis-a-vis the bank's hiring cycle periods.

Q. In other words, they were pretty well distributed between relative to race in the periods when they were hiring a lot of people and the periods when they were not hiring some people?

A. That is right. It wasn't the case blacks applied only when they were hiring few people and whites ap-

plied when they had a lot of positions opened. They were more distributed than that.

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[Tr. of Trial 129-32:]

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Q. Now, what—23-A and B, then, analyzes offers in these hiring cycles, does it not?

A. That is right. It breaks down table 22 into looking at the low hiring cycles and the high hiring cycles and asked what happened during those periods.

Q. And once again, are the—as between blacks and whites, do blacks continue to be discriminated against in the manner in which the offers are made in the high hiring periods, as well as during the low hiring periods?

A. Overall, that appears to be the case.

When you look at table—Exhibit 23-A, here are the times in which the bank wasn't hiring very many people. That is, they were hiring less than 10 percent of everybody who applied to them.

Now, during that time of slow hiring, they hired 3.9 percent of the blacks who applied and 11.2 percent of the whites that applied. If you want to look at it the other way around, they made 32 offers, three of them to blacks. That's 9 percent of the offers to black, versus 23 percent of all the applicants then who were black. And that is significant at .05.

Q. And then 23-B analyzes that same information in times of when they were hiring over 10 percent of the applicants; is that correct?

A. Correct. There were several six-month periods in which the bank must have been picking up in their hiring or something, and they hired more people. And in this time period, these six-month periods, they hired 4.4 percent of the blacks who applied and 21.9 percent of the whites who applied. If you would like to look at it again the other way, they made 63 offers. Five percent of those were to blacks. Although 20 percent of the ap-

plicants at that time was black and this is significant at .001.

Q. Now, I want to ask you at this point to go over with me Defendant's Exhibit No. 2, which I think should be in this stack right here, because—yeah. Here it is right here. This is your copy.

And here Mr. Shipp did a table. Once again, taking from the same kind of—from the same data, but what he did was he assumed kindly that—and just looked at the blacks on either side of—

THE COURT: Well, on one side of the hire. In other words, he went back two weeks from the date of hire, and he looked at how many blacks applied and how many whites had applied. Okay?

And so from—

BY MR. BRENDER:

Q. What he did was, he went back and looked at jobs in which blacks have applied within that—within that two-week period, or that 14-day period actually. I should say 14 days.

A. I am sorry. There is a black application within 14 days of hiring?

Q. Well, it's going to precede the hiring by 14 days, not within it, because they would simply go backward in time two weeks to see how many blacks and how many whites applied for each of those 35 jobs. And as I understand his figures, he found that for these 35 jobs—what he did was, he in essence selected about 35 jobs and looked at the people that applied for those 35 jobs, and he found that for those 35 jobs, there were 63 black applicants, and there were 108 nonblack applicants. All right?

Now, you can apply this same kind of chi-square analysis to this in light of the successes.

We'll look first at the higher rates. And we have—we have five blacks.

A. That's five of 63 blacks who were hired?

Q. Right.

And we have 30 whites, and then, of course, if you want you can look at it in terms of offers; and there were seven blacks that were extended offers and 33 whites.

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[II Tr. of Trial 132-34:]

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Now, if we analyze this, and use the chi-square analysis, what is our black hiring rate in—let's use hirees first.

And what would that be?

A. Five and 63?

Q. Uh-huh.

A. You cant a percentage?

Q. Yeah, just a percentage of black hiring rate.

A. About 8 percent.

Q. All right. And then the white hiring rate?

A. It would be about 28 percent.

Q. It would be 28 percent?

A. Yes. That's 30 of 108.

Q. Okay. In other words, very similar to what we found in the analysis we did when we analyzed the whole sample; is that correct? About a four—well, a little less than four. This one is a little more about than three to one?

A. Three to one, yeah.

Q. Okay. Now, when you did the chi-square analysis, did that indicate a significant result in the hiring rates, given the sample they chose to analyze?

A. On that table?

Q. Yes.

A. Yes. The chi-square significance is at .01.

Q. .01.

In other words, statistically speaking, we still have the same situation we had when we analyzed the whole sample, and for the most part we broke it down even, and that is that taking only these jobs in these two weeks

before a black happened to apply, we still got a statistically significant result because of the great discrepancy in the hiring rates between white and blacks; is that correct?

A. That is what I assume that these figures mean.

Q. And, once again, assuming these figures are correct and Mr. Shipp did an accurate count in arriving at the sample, what we have is a situation where the—where something other than—even if you were saying, "We're just going to look for qualified people," race was a factor here or at least it would be very unlikely, very improbable that race was not a factor, given this sample of the hiring status; is that right?

A. Yeah, about one chance out of a hundred.

Q. All right. Now, in that—and social sciences consider that to be a statistical significant and statistical analysis does, too, does it not?

A. Virtually always.

Q. Now, if we want to look at the offer rates, or the offers as opposed to the hires, what rate of offers do we have?

A. Okay. To blacks—is this seven out of 63?

Q. This would be seven out of 63, right.

A. Okay. That would be 11 percent—

Q. 11 percent for blacks?

A. —who got an offer.

Q. Okay. And then what about—I have been saying "whites" but really I should say "nonblack," here because they did include those others in the sample.

A. It would be 33 divided by a total of 108 who got an offer, which would be 31 percent.

Q. 31 percent for whites; right?

A. Yes. I think that is nonblacks, but, yes.

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[II Tr. of Trial 135:]

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Q. All right. But now, then, give this rate of hiring, once again, about three to one, white over blacks. These

are offers, anyway, not hiring. Excuse me. Offers. Is that a statistically significant result also?

A. Yes. That's significant, again, at .01; with the same interpretation.

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[II Tr. of Trial 135-36:]

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Q. I want to skip over to Exhibit 31 for just a minute.

A. Exhibit 31?

Q. Uh-huh.

A. Okay.

Yes.

Q. All right. Now, in this exhibit, you analyzed those people who were involuntarily terminated and you once again broke it down by race; is that corect?

A. Yes. That is right.

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[Tr. of Trial 137:]

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Q. All right. And the percentages show that blacks are—blacks are terminated at a rate that is about twice that of nonblacks; is that correct?

A. 20 percent versus 11 percent, yes, sir.

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[II Tr. of Trial 137:]

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Q. Now I want to go to Plaintiff's Exhibits 24 and 25.

And these exhibits analyze the departmental segregation by race at the Fort Worth Bank & Trust; is that correct?

A. Yes, sir.

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[II Tr. of Trial 138-39:]

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Q. So the data base does not include the officers and those sort of people at the bank. It just includes the graded positions. So we are not trying to find out or trying to crowd into this analysis the officers and the vice-presidents and people like that, but, rather, we're just using those people who were considered to be graded employees.

And what does Exhibit 24 then show us?

A. Well, it shows that there are no black persons, no blacks spent time up in the nonoperations department, but rather, all blacks spent all of their time in what we've described here as operations.

Q. All right. And what we did was—I guess I forgot to put that in there. This calculated the number of months during the data period, the sample period of the data in which they were employed in those type jobs; is that correct?

A. Yes, sir.

Q. All right. And then for nonblacks, the months were as you recorded there 15 percent were in nonoperations and 85 percent were in operations; is that correct?

A. Yes, sir.

Q. And did you perform statistical tests on this data, too?

A. The chi-square, that is the probability of getting that is less than .001 or less than one in a thousand.

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[II Tr. of Trial 139-40:]

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Q. Now, Exhibit 25, you added an additional factor to the operations, nonoperations analysis that you had—you had just completed. You actually here were just analyzing the nonoperations departments; is that correct? I mean, pardon me, the—the openerations depart-

ments. You were breaking that down into public and nonpublic jobs; is that right?

A. That has to do with the apparent amount of visibility.

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[II Tr. of Trial 141-42:]

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Q. So the Court will know, what jobs were considered to be public jobs and what jobs were considered to be nonpublic?

A. Public jobs, as I can tell, came out to safety deposit box, loan discount, switchboard operator tellers, security guards, bookkeeping, new accounts.

Q. All right. And what were were the nonpublic jobs?

A. Proofs, mail messengers, lunchroom attendants, check printing, ATM representative.

Q. Okay. And once again, did the—was there an indication of discrimination in the—when tested out in this manner, of the placement practices at the bank?

A. Well, there are some differences in where blacks and nonblacks end up. And the first one, most obvious one, which comes from the last exhibit is that there are no black people spending much time up in nonoperations but we have already looked at that.

When you look at the public operations races, you find that among the people, all the people in public operations or among all the time spent there, 15 percent is by black. 15 percent of the time there is by black employees. Whereas if you moved down into the nonpublic operations with less frequent contact, down there 29 percent of all the person time is by black employees.

Q. All right. Once again, we have calculated the person time as the number of months they were in those jobs; is that correct?

A. That is the way it was calculated. That is significant at .001. That is, the chances of getting that

table without anything else operating is one in a thousand.

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[II Tr. of Trial 142-44:]

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A. That's what table 26 does.

Q. All right. And what does the—what do the results of—First of all, explain to us what the first, second, third, fourth evaluations are?

A. Okay. An employee who was there could have several evaluations if they stayed for quite a long time. Actually, as you get down toward the fourth and fifth evaluation, there really aren't very many people down there.

So, the first and the second evaluation and maybe the third evaluation is, and maybe even the fourth one, is more interesting because that is what people are getting evaluated on the average for these two groups.

And on the first evaluation, for example, nonblacks had an average evaluation of 78, and blacks an average evaluation of 63.

Q. Okay. And then on the second evaluation, it was 82 and 69; is that correct?

A. About 83 and 69.

Q. All right. And then, once again, the average for nonblacks, 85 and 74; is that correct?

A. For the third evaluation, and then 86 and 75 on the fourth evaluation.

Q. Okay. And did you apply tests of statistical significance to these figures also?

A. Yes.

These are F tests, and you compute a significance on these. That is, if they were quite close they wouldn't be significant. As they get larger or as you get more cases, you get—tend to get greater significances and all of them are significant at least at the level of .05 or five chances in a hundred. Some of them are significant at a level of

one chance in a hundred, and then the first evaluation is significant at the level of one in 1,000.

Q. Okay. Now, why did you use a different test, a statistical test to show the analysis in these cases?

A. Because what you have got here is not whether they are hired or not, or offered or not offered. You have a variable which is their score which can be 30, 40, 50, 60, 70, 80, 90, 102 or something like that. It is the ratio variable, and I wanted to see what the the mean score was between these two groups, and that is why you use an F test.

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[II Tr. of Trial 145-46:]

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Q. Now, Plaintiff's Exhibit 27, what does this correlation—what were you doing here?

A. Okay. The question was, do people change much in their evaluations; for example, if you had a first evaluation, you had a bad score, what's the probability that you would have a relatively low score on the second evaluation as well?

And so what I am doing is comparing what people got on the first evaluation to the second evaluation, what they got on the first evaluation to the third evaluation, what they got on the first evaluation to the fourth evaluation; and seeing how similar those scores were.

What's reported in this table is a table of person-promoted correlations. The higher these go, the stronger the relationship. They can go up to 1.0. If there was no relationship at all, each of these would be about zero. In fact, if they were negatively related—that is hard to imagine why they would be, but they could be—you would get negative scores and what you see after the first evaluation, actually each evaluation with the next is quite highly related.

Q. All right. And what this is saying is that really over a continuing, the evaluation scores don't seem to

change a whole lot from one year to the next. Is that what we are saying?

A. There is a tendency for people who score high on, say, early evaluations to keep scoring high on subsequent evaluations. Incidentally, each of those coefficients reported in the matrix there are significant at .001.

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[II Tr. at Trial 147-48:]

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Q. Okay. Now, beginning with Plaintiff's Exhibit 28, you used a different type of statistical analysis or somewhat different type of statistical analysis than we have talked about before, one known as a multiple regression; is that correct?

A. Yes, sir.

Q. And can you explain for the Court and for me what, basically, does a multiple regression do?

A. Okay. A multiple regression is a procedure to analyze data. Let's say that you wanted to look at the effect of race on the independent or the independent variable, the first evaluation. You could look back a couple of tables ago or couple of exhibits ago and you would see that blacks got lower first evaluations on the average than did white people at the bank and thought it to be very interesting, and then you say, "Well, what if this has something to do with how long they have worked at banks or had experience before they came here." It might be, for example, that blacks just didn't have a whole lot of experience and so naturally, they got lower evaluations and that's not implausible; or, what if it was graded higher. That is, people—blacks come in lower, for example, at this bank on the average; and it might be that people down in low grades don't quite adjust as well and therefore, they get lower evaluations.

So, if you took out the effect then of where they started, race itself wouldn't really have an independent effect.

And that's what you are trying to do.

Now, this is impossible virtually; not completely, but it is virtually impossible to do without a little regression program and a procedure.

What you do first is basically say, "I want to look at the first evaluation. I want to try to figure out what is going on with the first evaluation. And I think that race has something to do with it. I think race is related." But it is possible that once you took out the effects of their previous experience when they got hired and once you took out the effects of wherever started on the job scale from one up to nine, that race really didn't—I mean there isn't any separate effect of race. And that is a way of controlling for the effect of race.

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[II Tr. of Trial 150-51:]

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Q. All right. And this first exhibit, Plaintiff's Exhibit 28, the thing that you have called the dependent variable, is that what what you are attempting to evaluate, the first evaluation and then the second evaluation?

A. Right. The question is—and the question was asked earlier: Are blacks getting lower evaluations, and you can see that they are simply by looking at the total averages; and are they getting in a sense evaluations which are lower than similarly placed white employees, that is, those with similar experience at the time they are hired and those of a similar grade when they are hired.

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[II T. of Trial 152-53:]

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Q. What did that show?

A. What it shows, is actually when you control for those two variables, their prior experience in banking and related industries, plus where they came into the bank—that is, at what job grade—that two similarly

situated employees, one black, one not black, would end up being predicted to get two very different scores. That is, the black employee would be evaluated on the average at 34 points on this scale lower than an identical white counterpart.

Q. All right. And what about the second evaluation? Would that hold true also?

A. Yes, it holds true. It is about 40 points different.

Q. All right. This doesn't mean that they would get a score of 30 points or 40 points lower, does it?

A. No, there may be nobody who is hypothetically identical.

Q. All right.

A. But this is the disparity between the coefficient which is attributable to race.

Q. All right. In other words, this is factoring out—when you factor out these other variables, you are looking solely at the effect of race and not at the other variables; is that right?

A. That is right. The coefficient is for race entered last in the equation.

Q. Okay. We'll offer Plaintiff's Exhibit 28 into evidence, Your Honor?

A. Incidentally, both of those coefficients are also significant at .001.

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[II Tr. of Trial 157-58:]

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Q. All right. Now, I want to discuss, then, Plaintiff's Exhibit 29.

This summarizes in summary in a, simply an average fashion, some of the statistics that we will talk about a little bit in Plaintiff's Exhibit 30; and once again from the data base, does it not?

A. Yes, sir.

Q. What is the exhibit? What is the first thing we are analyzing between races and promotions and compensation?

A. Okay. There are four things that we are looking at here. The first is annual average increases in grade. That is how much on the average a nonblack or a black comes up in the bank every year, and these first two, I should add, are computed only for employees who have been there over the year, since it really doesn't make any sense to be computing average annual increases for people who haven't been there one annual.

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[II Tr. of Trial 159-60:]

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Now, then, what does that show when you analyze that?

A. Okay. What it shows is that if you are black you'll go up at about an average rate of .18 job grades a year on the average, but if you are nonblack, you go up .53, job grades a year on the average. The difference is about a third of the job grade.

Q. Okay. Now, of course, people don't really go up a third of a job grade or a half of a job grade like that, but these are the averages when you look at it over that period of time; is that correct?

A. Average figures, yes, sir.

Q. And looking at it rate-wise, the rate was about three times the rate for nonblacks as for blacks; is that correct?

A. Between two and three times as great.

Q. All right. Now, what does the next category—what does that include?

A. Okay. This is a similar figure for how much people go up on the average in salary, from whenever they started or at the start of the class to the end of the class or if they left early or whenever they left, and then it is recomputed to analyze basis. And again, these are only people who have been there over a year since it really didn't make a lot of sense to give average annual figures who weren't there one annum.

Q. They weren't there in time to get a raise, if they weren't there a year.

A. Well, weren't there for one year.

Q. Okay.

A. That comes out to 14.9 percent for nonblacks as an average annual raise, and 12.0 percent for blacks as an average annual raise.

Q. All right. Now, what is the next category, average final grades?

A. Okay. This is the grade at which they ended up at the end of the class if they were still there, or where they ended up whenever they quit, whenever they left the bank, for one reason or another.

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[II Tr. of Trial 161:]

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Q. All right. And the average for nonblacks was 5.2 grades and 4.13 for blacks; is that correct?

A. That is right. A little over—well, almost 1.2 grades difference.

Q. Okay. And the final figure, I guess, is self self-explanatory. Is it an average salary figure; is that correct?

A. Yes. This is the average salary for everybody. Now, this includes people and whatever their annual salary was when they left. If they were still there at the end of the class, that is the figure we used. So this includes some people who left a little bit earlier or left sometime earlier. Whatever they were making then, that is what it is.

[II. Tr. of Trial 162:]

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A. So, here we get about $56 difference over the whole time period taken together, and if you take just then the period—people who were there at the end of

the class, there's a $38 average difference; but it should be noted that they are computed somewhat differently.

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[II Tr. of Trial 163-66:]

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Q. All right. But to look at average salaries or grades or things like that does not take into account, as we mentioned before, some of the other variables are to—to take out, for instance, what might be the effect of the grade that they were in or the evaluation scores that they got or the amount of tenure that they have, whether that be short or long, and so Exhibit 30 analyzes some of those—those considerations and attempts to see if those considerations are playing a part in these averages; is that correct?

A. Yes, sir.

Q. And how did you do that?

A. Okay. What we have are three groups of regressions. The first regression, we're looking at average annual increase in grade; that is, how fast the people get themselves promoted on up.

Now, we know that whites get promoted on up on the average faster than blacks do.

Q. Yeah.

A. We know that from Exhibit 29.

But what happens if you look at education?

For example, it might be that they have vastly different educational backgrounds, but that's really the variable. So we control for that. It's a personal characteristic.

Okay.

The second thing we are controlling for or taking into effect is where they started. For example, if you started up in grade 7 or 8 or 9, you probably didn't have as far to go up. I mean, you really couldn't have gone up as far as if you started in a 1 or a 2 or a 3.

And so that was something we looked for, so it controls for those two things.

Q. In other words if you were to say, "Well, sure, Richard Burt, he came to the bank and he worked his way up. He was an officer and worked hard and that sort of thing but he was going to college and getting some education along the way." And so he probably was in a better position to work up through the grades faster than Clara Watson who didn't have the college education or didn't get a college degree or at least the number of hours in college during that period of time. And it also took into account the fact that if somebody had a lot of experience and they were hired in at a higher grade, they were not going to go too much further than that grade, and therefore, like somebody who was hired in at a 2 or a 3 and had a lot of room to improve. Is that what you are saying?

A. It is hard to tell how it works. I mean, it may be people that come in at a 1 or a 2 just don't get promoted, but people that come in this higher grade, they just jump right up. But you have got to find out about that.

Q. We were trying to solve the problem and see whether those variables really counted and whether race would still be a factor, if we took into consideration the education and the grade in which they first entered the data base; is that right?

A. That is right. It is possible that race would just wash out, that it would have no significant effects because all the effects were due to education and where they started out.

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[II Tr. of Trial 167-71:]

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A. You'll note that is, in fact, even stronger—curiously, it is even stronger when you control for education and their initial grade than what just the average was back in Exhibit 29. There the difference, the detriment

to being black was .35. Here, even when you control for some things, the detriment to being black is .6.

Q. Okay.

A. So it just can't be explained away, I think, that way.

Q. Now, then the next equation looked at what?

A. Okay. Here we were looking at the final job grade and it's presented three different ways.

You remember back in Exhibit 29 we looked at just the differences and we found there was a 1.16 difference between the final job grade of blacks and nonblacks.

And again the question is: Could that really be attributed to something else? Could it, for example, just be attributed to education?

Q. Okay. Let me interrupt you just a second.

Because when we are talking about the final grade here we mean either the grade at which a person left the bank, if they left any time during the applicable period of this data base, or the grade that they had on the date the data base was cut off, that being March the 1st of '84; is that right?

A. Yes, sir.

Q. Okay.

Go ahead. Now, tell us how you—what you controlled for or what you were trying to test.

A. Here I took out the effects of education. And as I entered the education for each person and then I saw what happened, and then I entered race last. And in a sense, this is kind of a rigorous test because to the extent that race and education are related, you are taking out part of the independent effects of race. I mean, so it certainly works in, I think, the bank's favor to do tests like this. That's how it is.

Anyway, what you end up with here is that blacks are about 1.22 grades lower at the end of their final job grade than a similarly situated white person.

Q. All right. And what about when you took into account experience at final date?

What variable were you using there?

A. Okay. Total experience at final date is their total experience at the bank and total appropriate experience earlier. It says their total experience, up until whenever it was that they quit and had a final job grade or if they are still there, whatever it is, at 3-1-84.

Q. So this took into account two things that have been discussed.

First of all, their prior experience. Is that correct?

A. Yes.

Q. Their prior experience before coming to the bank?

A. Yes, sir.

Q. And I believe in the data base, that was interpreted to mean the prior banking experience, if they were—in a teller or something of that sort, and I believe the way it was put was if they were a secretary, it was prior secretarial experience. So it was related experience to the job that they were handling.

And also their tenure during the time they were at the bank; is that correct?

A. Yes, sir.

Q. In other words, the amount of time that they had been at the bank?

A. Some of those two things, yes.

Q. And then you looked at how that affected—Okay. You looked also at race to determine how that affected final grade.

How did it affect it?

A. Well, once again, we find that these things being controlled for in black applicants was about 1.21 job grades lower than an identically similar white person at the bank.

Q. Wait a minute. You said black applicants.

A. I am sorry; black employees.

Q. These were all employees, of course?

A. Yes, sir.

Q. So once again, the experience both before or after hire and their tenure did not affect the final grade analysis, either; is that correct?

Now, what was the final equation that you used in the test on final grade?

A. Well, I threw in another three. I picked out education, because it is characteristic and it may be related to brain or skills or something. I picked the experience, their total experience at the final date, just like above. So I picked the two variables above, but simply instead of putting them in one at a time and seeing what happened, I put them in two in plus one more even, the first evaluation, how did the person do on the first evaluation.

Q. All right. Now, let me ask you this: Why did you put the first evaluation as opposed to the second or third or all the evaluations?

A. There are some reasons for that. First, if you remember, all of the evaluations are pretty closely related one to another. That is, low evaluations on one and low evaluations on the other.

Q. In other words, that is the correlation analysis that you did a little earlier?

A. Yes.

Q. Okay.

A. So it really didn't matter whether you put in one or two.

Another thing is, you like as large a number as possible, and so since a lot of people began dropping out there and they don't get their second or third or fourth evaluation, you would like to have a fairly low class number of people there. I think that's an important point.

* * * *

[II Tr. of Trial 172-74:]

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Q. And what did that show?

A. Well, it shows here that controlling for those things, a black employee ends up at 1.38 job grades on the average lower than an identically situated nonblack employee. And, again, the chances of getting a difference

between blacks and whites, that that's great. It's just like—it is about one in a thousand.

Q. And that was the same for each of those three grade figures that you calculated, would that be correct?

A. Yes, sir, that is right.

Q. Okay. Now, the final—the final analysis that we did was on the salary, the final salary, that being the salary when a person left the bank or their present salary, if they are currently employed; is that correct?

A. Yes, sir.

Q. And what variables or what considerations, what things did you put into the model to attempt to take into consideration all those things that might affect salary and that might be indicating race when race was not supposed to be indicated or vice versa?

A. Well, quite a large number of them. Just as above, we put in education. We put in all their prior experience. We put in their first evaluation and also their second evaluation, and then we put in the midpoint of the salary range for whatever their final grade was. That is what the midpoint was for that salary range for each person's final grade.

Q. Why did you put that in?

A. Well, it simultaneously controls for what their final grade was, and it also to some extent controls for the time there, since the midpoints of salary ranges per grade goes up over time.

Q. Okay. So this really was controlled for that but also for their grade because that would indicate what their grade was. The midpoint would be where they should be salary-wise; is that correct?

A. It controls for that, yes.

Q. All right. What did that analysis show?

A. What it showed that if you put it in this way, and then you put in race last, race still has a coefficient of minus 45.98, which means, again, your hypothetical black employee is getting about $46 less a month than

an identically similar hypothetical white employee at the bank.

Q. All right. And this is looking at their final salary by the month—right?—the final monthly salary.

A. That is a monthly, not an annual salary.

Q. All right. And this would show—this would indicate about a $45 per month—

A. 46.

Q. $46 per month average less—or average salary that would be less for blacks than whites; is that right?

A. Yes, sir.

Q. And that—when we go back and look at Exhibit 29, that compares very favorably to the percentages that be calculated when we simply averaged the salaries. It's a little less, because some of those variables apparently did. Race was not accounting for all of it like you would think. We simply averaged it, but there was some taken out for some of the other, experience and education, that sort of thing. Is that correct?

A. Yes, sir.

Q. Okay. And now, the—once again, was this statistically significant also?

A. Yes, sir, it was statistically significant condition at .05.

* * * *

[II Tr. of Trial 175-76:]

* * * *

Q. Okay. Let me ask you a couple of things just in summary: In your opinion, do the figures and the analyses that you performed as accurately and as fairly as you can do, take into consideration all the possible explanations or reasons why blacks fare not as well, why blacks don't fare as well as whites in these various, be it salary or promotions or in their very rate of hire?

A. Yeah, they are race-related differences, most of them significant in all of those variables, both in the hiring part and in the treatment of present employees.

Q. And when you look at them, not only individually as we have here but as a whole and across-the-board, do you get a consistent pattern of discrimination occurring?

A. You get a consistent pattern of race related differences, depending on how many people you have and what the—the number of characteristics you are talking about. Sometimes it is stronger than others, but it is very very consistent in one particular direction; yes, sir.

Q. Okay.

A. And, frankly, I think that that consistency is about equal or more important than any single figure or the significance levels. I think that there is a consistent pattern that you need to be looking at. That is a personal view.

• • • •

CROSS EXAMINATION BY MR. McGEE

[II Tr. of Trial 180:]

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Q. It is true, is it not, the size and sample affects the result, as well as the type of test that someone uses in this type of analysis?

A. The size of sample can affect it but not in all situations.

• • • •

[II Tr. of Trial 182-84:]

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Q. And where you look at the black and the white hirees—first of all, as you have already testified, you did not consider nonblacks; you just considered whites; is that correct?

A. Whites and blacks.

Q. Okay. I believe you testified that in your opinion, the exclusion of Hispanics and Orientals or other ethnic groups would not have had any significance on your results; is that correct?

A. The reason I selected them was because I wanted to compare blacks and whites.

Q. Well, the reason you selected them was because that is what you were instructed to do, really, wasn't it?

A. Yeah, I was asked to compare blacks and whites.

Q. Okay. So you didn't—you formulated the tests to meet the end, is really what it amounts to. You didn't try to take an objective look at the bank and try to determine what was going on; you were trying to reach your result?

A. No, I don't think that is an accurate statement.

Q. My question really was: Is it your opinion that the exclusion of those Hispanics and Orientals and other racial groups is not a significant—does not have any significant effect upon your results?

A. I don't know whether it would have a statistically significant result on any of these. I never analyzed them.

Q. But practically speaking, we are talking about 29 people, are we not, 28 people, I believe?

A. 28?

Q. 28.

A. 28 what?

Q. People that are Hispanic or Oriental or other racial groups that are not either white or not black?

A. Just a second.

I have 28.

Q. 28; is that what you have?

A. That is what I have.

Q. All right. That is—at any given time, that represents more people than there are blacks at the bank, does it not, roughly three—really, over three times as blacks as there are currently employed at the bank?

A. Are you comparing the number of Hispanic and Oriental applicants to the number of black employees?

Q. Yes.

A. Yes. Yeah.

Q. Now, 28 people is not insignificant. You would agree, would you not?

A. Well, the problem is that my data base here is 768.

Q. And you have not tested that, so you don't know whether it is statistically significant or not?

A. What's significant?

Q. The 28 people that you excluded.

A. Have a statistical or significant—a statistically significant part of the 768?

Q. Well, whether their exclusion would affect the results that you put onto these exhibits, the results that you have gotten from your analysis?

A. No. I think I can answer that I excluded Hispanics; Oriental, and the missing data and never analyzed them again.

* * * *

CROSS EXAMINATION OF GARY WAYNE SHIPP BY MR. BRENDER

[II Tr. of Trial 218-19:]

* * * *

Q. Now, page 157 of the transcript of the class certification hearing, which was held on June the 24th of 1982, I asked you—Pardon me. I think it's at page 140 of the transcript, I asked you at line 7—okay—in that connection—sorry; my page is a little wobbly here—

Question: Are you the person who is responsible for hiring at the bank?

Answer: I'm in charge of the personnel department.

Question: Okay. And I take it on personnel decision, hiring, termination, et cetera, I suppose that's termination, et cetera, you obviously asked for input from others within the bank, but I take it you have the ultimate final say in these decisions; is that correct?

Answer: Yes, I discuss it with the supervisors when a decision is made by them.

All right. Now, you are saying now that these decisions are solely up to the supervisors; is that correct?

A. Yes, sir. I'm not—I am aware I said those things and I don't feel like that I explained it thoroughly.

The purpose of me discussing with the supervisor is to see that the value rate fits within the ranges that we have established for that job. To go from there and check references, credit check, you know, that sort of thing. As far as making a decision, I do not sway their decision in the least. They choose the person they want to hire: I don't hire them for them.

• • • •

[II Tr. of Trial 219-20:]

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Q. I see. Okay. Now, I want to ask you if during the period of time following the period of time starting in 1980 after Clara Watson had applied for and been turned down for the two teller jobs or supervisor jobs we discussed previously, did she become the assistant to Mr. Burt, Richard Burt that we have discussed before?

A. You are talking about after the 1980—

Q. Yes. In 19—

A. Yes, approximately February of 1980, I think would be the correct timeframe or thereabouts and right after the decision was made to made to make Mr. Burt the teller lobby supervisor and Pat Cullar the supervisor in the motor bank.

A. Okay. At that time, Richard Burt and I met with Clara. And it was anticipated that Richard had other duties besides just supervising the tellers, and we wanted to know if—really, if she would be interested in, while he's away, taking care of certain functions for him.

Q. Well, did you make her his assistant?

A. The word "assistant," as far as I am concerned, was never used; as far as being designated title.

• • • •

[II Tr. of Trial 221:]

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A. She assisted him in certain functions of that job, none of which had to do with supervisory reviews of employees and that sort of thing.

Q. Did she assist him by by interviewing some of the people that came to the department when he wasn't there, seeking employment?

A. I was not aware of any if she was.

Q. Are you really aware fully to the extent of the supervision she was giving to the department at that time, or to Mr. Burt?

A. Basically, yes.

Q. How were you familiar with it?

A. Well, that's the kind of thing that he would tell me what is going on.

Q. Okay. Now, with regard to these decisions to not promote Clara Watson, I want to take them both first in 1980.

The only reason that you advanced at that point—for not promoting her to the job of supervisor of the motor bank, I believe, was that she lacked supervisory experience; is that correct?

A. In the motor bank in when, 1980?

Q. In 1980, when Pat Cullar got the job.

• • • •

[II Tr. of Trial 223:]

• • • •

A. Okay. As I recall, that was the main agreement in that decision.

Q. All right. But Pat Cullar didn't have any supervisory experience, either, before she took the motor bank job, did she?

A. No, she did not.

• • • •

[II Tr. of Trial 224:]

Q. Now, we've discussed this situation about there was a 90 day period when you would advance somebody and they wouldn't get the pay raise for another 90 days; isn't that correct?

A. That is generally the policy, yes.

Q. All right. Let me ask you if that was the policy when Pat Cullar became supervisor of the motor bank on 2-15 and 80.

She was given an increase was she not?

A. It appears that she was, yes.

Q. In other words, she was given an increase right at the time this selection was made. She didn't have to wait 90 days, did she?

A. That appears to be right, yes.

Q. Okay. Then looking down, she got another increase on 9-80, which was apparently her regular annual review. In fact, she got a $79 increase on the 15th of February of 1980.

In September of '80 she got a $70 increase, apparently pursuant to her annual review, and then on 2-1-81 she became the inside supervisor of the lobby; right?

A. I believe that is right.

Q. And then she got a $95 a month raise on that same day; right?

A. That appears to be right.

Q. So she didn't have to wait the 90 days before she got her raise, did she?

A. That appears to be correct.

[II Tr. of Trial 228:]

* * * *

Q. And then let's look at the next review. This is after she was lobby supervisor, page 5 of that next review, "In what areas does she need improvement?" and it says—Are you to that one yet?

A. Yes.

Q. Okay. "Overall experience and supervising people," where she needs some improvement.

Is that correct?

A. That's what it says.

Q. All right. And where it says on the last page where there are some written comments, a little hard to read, but No. 3 says leadership, again, "Experience is

needed. Remember to give credit when due, as well as criticize."

A. Where are you reading there?

* * * *

[II Tr. of Trial 229-30:]

* * * *

Q. Who was the person that reviewed her in this? Was this your review of her?

A. Yes, I filled this review out.

Q. Okay. These were your comments yourself?

A. Yes, sir.

Q. And your observations of her as a supervisor; is that right?

A. That is correct.

I think if you will look in a lot of our supervisor reviews—in fact, we mentioned that yesterday—talking about there's comment made about them needing more supervisor experience.

Q. Well, I understand that these are supposed to be done in a constructive manner and so forth.

But what the point is, you are basing this decision solely on supervisory experience, and what you have here is a person who was actually somewhat inexperienced in supervision; is that correct?

A. I don't think any of us are experts in supervision. That is the whole point.

* * * *

[II Tr. of Trial 232-33:]

* * * *

Q. Let me ask you to look at the Plaintiff's Exhibit No. 1, which is Richard Burt's employment application and once again if you will turn on the employment history page, there are two pages of his employment history. I am looking at the second page.

A. Okay.

Q. All right. Now, once again, he was another one who received his wage increases at the same time he got his promotions, did he not? He didn't wait the 90 days. If you look, he's had two or three of them there.

A. Okay. We're talking about in '79? Bookkeeping supervisor?

Q. Yeah.

Well, he was supervisor—bookkeeping supervisor and looks like to me that he got a raise right away and then when he was made assistant cashier of bookkeeping, I guess that was, he got then on an annual salary; and then when he was made assistant vice-president, I take it that was really when he was also the lobby supervisor. Doesn't say that on the sheet, but that is the job that he had at that time from the earlier testimony.

He got his raises right away did he not?

A. Normally in the officers' categories when they are promoted they get a raise at that time; a little bit different. In the bookkeeping supervisor situation, he had been in that—had been assisting in that particular job for some months.

Q. Okay. And look at Plaintiff's Exhibit 3, which is Kevin Brown's employment folder, personnel folder. Once again, look at the employment history.

* * * *

[II Tr. of Trial 233-35:]

* * * *

Q. Now, when he was made motor bank supervisor, the job that Clara Watson had applied for on 2-1-80, he received a raise right away. He didn't have a 90-day wait, did he?

A. It appears that is correct, yes.

Q. All right. And were you the one that made the decision to advance Kevin Brown over Clara Watson?

A. Ultimately I was involved in it, but I was—the recommendation was made to me by Richard Burt.

Q. Why was he advanced over Clara Watson?

A. Who?

Q. Kevin Brown.

A. There was a lot of criteria involved that I am not totally aware of, and the decision was made. That is the recommendation he had, and supervisory experience was part of the decision, I know.

Q. I believe that is what you testified to, once again—

A. Yes.

Q. —at your—at the class certification hearing, that—once again, on page 148, that—that we talked about the fact that he had only been employed there for about six months on a full-time basis, and was there anything—what supervisory experience did he have that Clara Watson didn't have as the assistant to Richard Burt?

A. Kevin had been a supervisor for Six Flags Over Texas.

Q. He had a summer job where he supervised some other kids, picking up some paper at Six Flags?

A. It wasn't really a summer job. It is what you would call a seasonal job. It was about 11, 10 to 11 months out of the year.

Q. And he had hardly any knowledge of the bank because he had only been there for a year or six—and six months of that part-time job; right?

A. Been there about a little over a year.

Q. And yet, you are saying that he—that he had greater qualifications than Clara Watson for that job?

A. The recommendation was made to me and that is the decision that was made, that he did, yes.

Q. But you don't think that he really did, looking back at it. Is that what you are telling me?

A. I'm not—I can't say that. Supervisory experience was a big factor in that.

Q. I see. You are saying in this courtroom today you feel like Kevin Brown was a better choice, had bet-

ter qualifications to be advanced on the motor supervisor job than Clara Watson.

A. I do.

Q. What is the basis for that now?

A. From the recommendation and the criteria that was submitted to me, the recommendation included the supervisory experience level that he had had. We justified that, and that appeared to be—that among other things, he appeared to be the best one for the job.

Q. About what were the other things that were recommended to you, other criteria?

A. The kind of job that he had done while he was in the motor bank, assisting Pat while she was supervisor there. His reviews that he had received, you know, proved that he knew what was going on there. And as I recall, of course, supervisor experience, previous supervisor experience had a great deal to do with it.

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[II Tr. of Trial 235-36:]

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Q. First let me ask you this: We talked about all of this experience. You have advanced people before to supervisory jobs that had no supervisory experience, did you not?

A. That is correct.

Q. In fact, I think Weatherly was one; is that right?

A. That is correct, yes.

Q. Who else?

A. Oh, goodness.

Q. Pat Krantz, I believe, was another?

A. Chazelle Kretsinger.

Q. Kretsinger?

A. Kretsinger was not really designated as a true supervisor, no.

Q. What did she—

A. She had responsibility for seeing a certain area of the bank got down but she really didn't fill out the review forms.

Joy Chandler is one.

Q. All right.

* * * *

[II Tr. of Trial 237-39:]

* * * *

Q. How about Linda Colwell?

A. Linda Colwell, yes.

Q. And Linda Brimer?

A. Linda Brimer, yes.

Q. Brimer. Excuse me.

Of course, Kevin Brown, did he have previous experience? You say he did have previous experience?

A. He did have previous supervisory experience, yes.

Q. What about Gail Leavitt? She was advanced without previous supervisory experience; is that right?

A. I believe that's right.

Q. And Richard Burt; he didn't have any previous supervisory experience, did he?

A. That is correct.

Q. And, of course, Pat Culler didn't have previous supervisory experience.

A. That's true.

Q. And all of those are white; right?

A. Right.

Q. Okay. I'm not going to be—Suffice it to say that by the time he left the bank, which was 9 months—well, let me put it this way: By the time he had a review in September of 1981, after he had received this job in February of '81, he was not getting a very high review for a supervisory person; in other words, the summary of his overall performance was fair. Maybe the performance comes close to being competent, but the need for further development is recognizable; is that right?

A. Yes, he was having some problems.

Q. And they were problems in dealing with and supervising the people in the motor bank, were they not?

A. Let me take a look at this.

Q. Look at the potential review.

A. Uh-huh.

Q. Page 6.

"At the time he needs to be more responsive, needs more responsibility of his department, handling the problems of his people, himself," something?

A. Himself.

Q. "Insufficient checks," apparently?

A. "Lack of I.D.s and insufficient checks."

Q. All right.

"Tried to get him to take more responsibility of his people without my assistance and he's got a potential some.

And then there's some written comments and that was filed three months later by his resignation which was, I believe, was more or less requested, was it not?

A. I don't recall. I don't recall whether it was requested, no.

Q. Well—

A. It had not greatly improved and he was not doing real well.

Q. He was not going to stay there as a supervisor any longer, really, at his present level of performance, was he?

A. Well, it was, as I recall, it was not—you know, it was not the greatest job we have ever seen done. He was having some problems.

* * * *

REDIRECT EXAMINATION BY MR. McGEE

[II Tr. of Trial 243:]

* * * *

Q. Well, reviews or when someone was hired?

Basically on a day-to-day basis, did you have a hands-on connection with all of the decisions in the personnel area of the bank or did someone else make most of those decisions?

A. As far as—I was ultimately responsible for anything that went on, as far as personnel matters. But as far as actually interviewing the employees, I rarely did that. And I never did hire any of the employees that did not directly work for me. Those were handled by the supervisors themselves. But ultimately, as far as the outcome of what took place in the personnel area, I was responsible and held accountable for that.

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[TESTIMONY OF GARY WAYNE SHIPP AT CLASS CERTIFICATION HEARING, BY MR. BENDER, JUNE 24, 1982:]

[Tr. of Class Cert. Hrg. 140:]

• • • •

Q. Okay. In that connection, are you the person who is responsible for the hiring at the bank?

A. I'm in charge of the Personnel Department, yes.

Q. Okay. And I take it on personnel decisions, hiring, determination, et cetera, you obviously ask for input from others within the bank, but I take it you have the ultimate final say in those decisions, is that correct?

A. Yes, I discuss it with the supervisors when a decision is made by them.

• • • •

[Tr. of Class Cert. Hrg. 157:]

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Q. Would you have any reason to think, just in looking through these application logs of people who came through the door and left you an application, that there would be any more that would be—and we are going to assume some of them probably were not qualified for the jobs that they were applying for.

Would there be any more reason to think there were more blacks that were unqualified than whites that were unqualified?

A. I don't know how to answer the question. I don't know what to base my answer on.

Q. Do you have anything, anything that you know of that you would be aware of, that would make you think that there would be fewer blacks that would be qualified than whites that would be qualified, just in terms of people who come through your door and leave their applications?

A. No.

* * * *

[Tr. of Class Cert. Hrg. 194-95:]

* * * *

Q. Mr. Brown—Plaintiff's Exhibit 8—states in his application that his duties were—asked to describe your experience in a concise manner, et cetera.

Responsible for waiting on and ringing up customers, the nights—I don't know—I don't know if we can read that. I turn in a register. Other duties include restocking and watching for shoplifters. Responsibility is general merchandise control. Next to that is cashiers. I had to keep a close watch on cashiers. At the end of my shift—something else is missing there—to look for over/shortages. I have had five years cashiering experience.

Now, that sounds like that his vast amount of experience is basically a cashier-type person, was it not?

A. That's what that would indicate, but we had verified that he had the supervisory experience along with that.

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[TESTIMONY OF JOY CHANDLER AT CLASS CERTIFICATION HEARING, BY MR. BENDER, JUNE 24, 1982:]

[Tr. of Class Cert. Hrg. 281-82:]

* * * *

Q. When did you first come to work for the bank, Mrs. Chandler?

A. Five years ago June the 15th.

Q. Okay. And what job did you hire in at?

A. Customer service.

Q. Okay. And did you have any prior banking experience prior to that?

A. No, I did not.

Q. Okay. Had you had any related experience as a cashier or anything like that?

A. No.

Q. Okay. So, that was your first stab at the banking business, I take it?

A. That is right.

Y. Okay. And how long did you stay in the customer service area, then?

A. Two and a half years.

* * * *

[Tr. of Class Cert. Hrg. 282:]

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Q. Okay. And then at the end of that two and a half year period, is that when you were advanced to the bookkeeping supervisor?

A Yes.

Q. Okay. And whose place did you take there as bookkeeping supervisor?

A. Richard Burt.

* * * *

[TESTIMONY OF GARY WAYNE SHIPP AT DEPOSITION, MR. BRENDER, JUNE 8, 1982:]

[Tr. of Deposition of Gary Wayne Shipp 16-18:]

* * * *

Q. And under you is the Personnel Office; is that right?

A. That's right.

Q. It's staffed by Sandy Carson?

A. Right.

Q. Are you the person, though, that makes most of the personnel decisions as such?

A. Yes.

Q. Sandy Carson is more or less your secretary?

A. Secretary and assistant, yes.

Q. How is the hiring done? When somebody comes in to apply for a job, are they interviewed first by your office? How does that proceed?

A. The procedure would be to—if we have an opening, we'll take an application for whatever job they're applying for; and if there is an opening, I will sometimes interview; and if I'm not available, they will be interviewed by the supervisor of the department that does have the opening.

Q. After your interview, is there any other interview by any other bank personnel?

A. Again, it depends on whether there is an opening in an area.

Q. I take it you don't interview them unless there is an opening?

A. That's right.

Q. So if you have an opening, you interview them. Do you then send them down to somebody else to interview them?

A. Yes.

Q. Is that done only in cases that you determine that you want to hire them?

A. Well, that I would like for someone else to interview them, yes, if I think they're qualified for the job.

Q. If you don't particularly care for them, you don't send them down to the second interview?

A. Well, if they don't meet the qualifications or something of that nature.

Q. Well, what I'm getting at is, let's assume that you have two people that pass the typing test or whatever. Do you send on to the second interview just those that you're fairly impressed with, or do you send all of them along, so long as they possess the minimum qualifications?

A. I send them all.

Q. Is there any other interview after they go to the department head?

A. Their direct supervisor usually decides which one they think they would like to have, and we discuss it from there.

Q. You and the supervisor discuss it?

A. Uh huh.

Q. And then do you have the final say in that? I'm assuming you do.

A. Yes, I do.

* * * *

[Tr. of Deposition of Gary Wayne Shipp 25-26:]

* * * *

Q. When a job becomes open within the bank, do you have some kind of posting system for informing employees?

A. Yes.

Q. How is that done?

A. We place a notice on the bulletin boards at the main bank and the motor bank telling what position, what grade it is, and what they must do to apply for it, and what length of time we will accept applications, three days.

Q. How many days?

A. Three days.

Q. Three days?

A. Normally.

Q. How long have you been posting jobs in that way?

A. Since August of '79.

Q. August of '79?

A. Yes.

Q. A person who is already employed there, they already have an application on file, I take it. What do they do?

A. That's what we're talking about is the posting. They come and fill out a form that they apply for this position, this one that is posted. That's what I mean by application.

Q. Does the posting have on it the requirements in your job manual?

A. Normally, they do not have any requirements, only in certain cases for like a secretary where we know we need a minimum of so many words per minute typing. Usually only in those cases.

• • • •

[Tr. of Deposition of Gary Wayne Shipp 40-41:]

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Q. Who all applied for the motor bank supervisory position?

A. Clara Watson, Kevin Brown, Donna Love, Sylvia Harden, I believe. I believe that was all.

Q. Kevin Brown was selected, I believe; is that right?

A. Right.

Q. Did you and Mr. Burt also make that decision?

A. Yes, we did.

Q. Did Pat Cullar have any say-so in that decision?

A. No, she did not.

• • • •

[46-47:]

• • • •

Q. When you were considering experience, did you consider Clara Watson to have had experience in supervising other employees, also, within the bank?

A. No.

Q. Why not?

A. She hasn't. In my opinion a supervisor, functioning as a supervisor, makes salary reviews, hires individuals, terminates those individuals, and she had no training in that area, in my opinion.

Q. In terms of hiring people and firing them?

A. Making salary reviews. That sort of thing.

Q. Did she have supervisory experience in the other sense of directing employees in their day to day duties?

A. She was considered Richard Burt's assistant when he was away from his post.

Q. What did those duties require?

A. To okay checks that the tellers would have a question about; to confront customers that would have a problem of a general nature; acting upon the daily routine set out by the supervisor, who was Richard Burt; she would see that those got done; that sort of thing.

Q. How long did she function in this capacity?

A. I do not remember.

Q. But you didn't consider this supervisory experience such that she would be eligible for doing the supervision in the motor bank?

A. I did not consider that.

Q. She certainly had more banking experience than Kevin Brown, did she not?

A. That's true.

• • • •

[52-53:]

• • • •

Q. Who became Richard Burt's assistant after Clara Watson left? I guess it would really be Pat Cullar's assistant; is that right?

A. Yes, after Richard left, it would be Pat, yes.

Q. He was advanced; he didn't leave?

A. Gosh, I don't recall initially who it was.

Q. Who is now holding that?

A. Linda Brimer.

Q. Is that generally done on kind of a seniority basis? Is it the person that's been there the longest?

A. That's not really the basis, no.

Q. How is that person selected?

A. It's generally decided upon by that supervisor who is eligible to take on that responsibility.

Q. In other words, it is kind of a merit sort of thing. The person who you feel like is the best worker, or the smartest, or whatever, is going to get that over somebody who just has more years on the job?

A. The most capable person, yes.

• • • •

[59-60:]

• • • •

Q. Now, at thhe top of each of these applications, there is a marking that has a B/F, on Doris Hines, for instance.

A. Yes.

Q. Does that indicate a black female?

A. Yes, it does.

Q. And on Plaintiff's Exhibit No. 2, I believe, it's an M/B. Would that indicate a black male?

A. It should be black male, yes.

Q. And on Plaintiff's Exhibit No. 3, you have a W/F, which I take it is a white female; is that right?

A. Yes.

Q. And Plaintiff's No. 4 you have W/F which is a white female; is that right?

A. That's right.

Q. There is no place in the form itself for race or sex, is there?

A. I don't believe so. There shouldn't be, no.

Q. I think this form is a copyrighted form from Hilton Shepherd Company, personnel consultants here in Fort Worth; is that right?

A. Yes.

Q. Do they do some work for the bank, or do you just buy those forms?

A. We just buy those forms from them.

Q. Who makes this notation at the top of each of these employment applications?

A. The person in our personnel area that takes that application or receives it in hand.

Q. What is the purpose in designating these applicants by race and sex?

A. For one reason, to fill out the job applicant flow log. That's done, like I said, as early—daily, or as soon as we can during the week; and without that, it would be difficult to do that.

The other reason is so we'll know. We just file them.

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DIRECT EXAMINATION OF JAMES K. McKNIGHT BY MR. McGEE

[III Tr. of Trial 2-4:]

* * * *

JAMES K. McKNIGHT DIRECT EXAMINATION

BY MR. McGEE:

Q. Mr. McKnight, state your full name for the record, please?

A. James K. McKnight.

Q. How are you currently employed?

A. I am Executive Vice-President of Fort Worth Bank & Trust.

Q. How long have you served in that capacity?

A. Since March of 1982.

Q. Had you served in any previous capacity at Fort Worth Bank & Trust prior to that time?

A. No.

Q. And prior to coming to Fort Worth Bank & Trust, where had you been employed?

A. At First National Bank of Fort Worth.

Q. What capacity there?

A. As vice president and loan officer.

Q. As a part of your responsibilities as Executive Vice-President of Fort Worth Bank & Trust, do you serve on the Salary Review Committee?

A. Yes, I do.

Q. How many members are on that committee?

A. There are three.

Q. And is Gary Shipp one of those members?

A. Yes.

Q. And Helen Brister the other?

A. Yes.

Q. Tell the Court very briefly the function of the Salary Review Committee.

A. We are there to review the performance appraisals that are completed by the supervisor and to give them

guidance on, not only the reviews that they have done, but the salary recommendations that they might make.

Q. Who has the ultimate responsibility for preparing these evaluations and determining a number of points that a particular employee will receive?

A. Well, the supervisor prepares the appraisals, and the points are based upon the grades on each individual area.

Q. Does the committee award those points or does the supervisor?

A. No. The supervisor grades the employee on the appraisal, and then the points are just tallied up at the end.

Q. All right. How long have you served on the Salary Review Committee?

A. Since I came to the bank.

Q. So approximately two-and-a-half years?

A. Right.

Q. During that two-and-a-half-year period, have you seen any evidence that Gary Shipp exerts extreme or unusual influence in the decisions of the Salary Review Committee?

A. No.

Q. Is his participation any greater or less than any other member of the committee?

A. No.

* * * *

CROSS EXAMINATION BY MR. BRENDER

[III Tr. of Trial 9-10:]

* * * *

Q. Then you look at the rating of the nonofficer salary review worksheet, and you look at the rating given by the supervisor, and you make a determination on whether or not that rating is an accurate rating; is that correct?

A. No. Those review sheets right there are handled by the supervisor. We don't pick them up and look at them.

Q. You don't look at the review sheets at all?

A. We are listening to the supervisor, and they are giving the review.

Q. Do they then give you what they find to be the final rating?

A. We tally the points and make sure that they are correct, based upon individual areas as to grade.

Q. So you do tally the points up and see what the final evaluation is; is that correct?

A. Yes.

Q. Okay. And then you look at what the percentage of increase that's going to be given by virtue of that evaluation and determine whether you feel like that is a correct percentage increase or not; is that correct?

A. Well, we've already determined that those are the percentages that we would like to have in the way of raises based upon those scores.

Q. I understand, but you look at the score—Okay. In other words, if you feel like the score is a score this employee really deserves, then you are going to approve that score, which automatically approves that percentage raise; is that correct?

A. Yeah. If everyone agrees basically on the review and, you know, it's already predetermined what the percentage would be.

* * * *

[III Tr. of Trial 14:]

* * * *

Q. Well, do you look at any of these review sheets? Do you look at how they are rating these people?

A. Normally I don't look at these review sheets.

Q. So the salary committee doesn't look at those review sheets, then?

A. We may have one member on the committee that wants to see the bottom sheets, for instance, but nor-

mally all these sheets are the same, and the supervisor is reading what they have already written, and there is no need for us to look at it.

Q. So, when the Salary Review Committee, then, is listing to the supervisor, they are either rubber stamping what the supervisor does or going off on their own tangent; is that right?

A. Well, we usually agree with what the supervisor has. If we don't agree and there's some discussion needs to be made, well, there is.

Q. Okay. You say you usually agree. How often would you disagree, as best you can estimate that by number of times or number of people or whatever?

A. It is hard to say because there are several different areas that we are reviewing on every employee.

[III Tr. of Trial 19:]

* * * *

Q. All right. Can you recall any instances when the supervisor's rating has been lowered by the Salary Review Committee?

A. Oh, on one particular area or on the overall score?

Q. Well, I guess it would be the same thing. If you lowered them on one area, that would lower the overall score, would it not?

A. There have been times when after discussion a supervisor will see that perhaps another rating is more appropriate.

Q. So what you do is you say, hey, look, I don't think this employee ought to be rated this highly, and then the supervisor says, yeah, I think you are right, and lowers the rating. Is that what you are saying?

A. No, no. Usually the supervisor will defend their original position.

* * * *

[TESTIMONY OF JAMES K. McKNIGHT AT TRIAL, UPON QUESTIONING BY THE COURT:]

[III Tr. of Trial 24-25:]

* * * *

Q. During the review—when the committee reviews the evaluations of various employees, during the time that you have been there, has there ever been any discussion concerning the race of an individual during that review meeting?

A. No, sir. As I mentioned before, a lot of times I don't even know what the race is when they come up there. We don't have a picture or anything attached to the review. It is just reviewed on the performance.

Q. Have you ever heard a person's race mentioned in connection with the review of any case you have set on?

A. If I don't know the person's name and they are trying to identify them to me it may come up that way.

Q. In any other way have you ever heard the race of an individual mentioned?

A. No.

Q. Or the sex of an individual mentioned?

A. No. We can usually tell from the name, of course, what the sex is.

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DIRECT EXAMINATION OF
RICHARD ALLEN BURT BY MR. McGEE

[III Tr. of Trial 26-27:]

* * * *

Q. Mr. Burt, state your full name for the record, please?

A. Richard Allen Burt.

Q. How are you currently employed?

A. I'm employed with Summit National Bank and with Summit Bancshares and also with Tarrant County Junior College.

Q. In what capacity are you employed by Summit Bank?

A. Summit National Bank, I am Vice President-Cashier.

Q. And at Summit Bancshares, what is your employment?

A. Vice-president in charge of operations.

Q. All right. Is Summit Bancshares the parent, in effect, of Summit National Bank?

A. Yes, it is.

Q. Is that a single bank holding company or multi-bank?

A. It is a multi-bank holding company.

Q. What other banks are a participant in that holding company?

A. Alta Mesa National Bank and Camp Bowie National Bank.

Q. You mentioned you are also employed by Tarrant County Junior College. In what capacity are you employed there?

A. Part-time instructor.

Q. What courses do you instruct?

A. Several different banking courses, management courses.

Q. Are these courses you teach at night school?

A. Yes, sir.

Q. All right. Prior to your employment in Summit National Bank and the others that you just named, where were you employed?

A. First City Bank of Lancaster.

Q. And what was your position at that point?

A. Vice President-Cashier.

Q. All right. And prior to the bank in Lancaster, where were you employed?

A. Fort Worth Bank & Trust.

* * * *

[III Tr. of Trial 31:]

* * * *

Q. All right. When you left your responsibilities as teller supervisor, of course there had to be someone selected to take your place. Was the selection of that replacement under your supervision or under your direction?

A. Yes, sir, it was.

Q. All right. And who made the decision as to who the replacement would be?

A. I did.

Q. All right. Did you have occasion to interview the various applicants for that position?

A. Yes, sir, I did.

Q. All right. Was Clara Watson one of those applicants?

A. Yes, sir, she was

Q. There were other applicants, I assume?

A. Yes, sir. There was probably six or seven total.

Q. Who was ultimately selected?

A. For the lobby teller supervisor position, Pat Cullar.

* * * *

[III Tr. of Trial 32-35:]

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Q. All right. And did you have to get Gary Shipp's agreement on that selection?

A. Well, formally, yes, I did. The way that works is I was the one in charge of the responsibility of interviewing each of the applicants, doing all the investigative type work of talking to maybe previous employers or previous jobs that they had been on. I was the one that interviewed the people that had applied for the job, and I was the one that made the decision.

And, you know, since Mr. Shipp was my supervisor, I had to tell him, this is the decision that I have made and, you know, more or less give him the opportunity to change it or to okay it. And he never changed any decision that I made.

Q. All right. In making the selection of Pat Cullar as the lobby supervisor and choosing her above the others who made application, including Clara Watson, tell the Court how you evaluated those applicants and arrived at your decision that Pat Cullar was your choice?

A. Well, there's a lot of things that go into being a supervisor, and, you know, there's experience, leadership ability, you know, experience in supervising others previously, ability to get along with others and numerous things. And what I did was just call each of the applicants in, spend a brief time with them, talked about their experience before and, you know, what they had previously done. And from that chose what I believed to be the best applicant.

Q. You had had an opportunity to work with Ms. Watson more or less perhaps closer than the other tellers who were under your supervision because of her additional assistance to you.

Did you form an opinion as to whether or not she was suitable at that time to be a supervisor?

A. Yes, sir, I did.

Q. What was your opinion?

A. At that point, we had some resentment from other tellers under her leadership. There were times when, like I said, she was the one to go to when they needed a check okayed or something. You know, minor help like that when I was not available. And the other tellers would not go to Ms. Watson to get a check okayed. They would either call the drive-in supervisor or maybe bookkeeping supervisor or find help in some other manner.

Q. Who was the drive-in supervisor at that time?

A. Pat Cullar was.

Q. And she was the one that you ultimately selected as the teller supervisor or lobby supervisor?

A. Yes, sir.

Q. In your decision to choose Pat Cullar—or state it another way, in your decision that Clara Watson was

not the right selection, was Clara's race given any consideration?

A. No, sir, it was not.

Q. With regard to your experience at Fort Worth Bank & Trust in supervisory positions, were you given the authority to hire your employees, the employees that worked underneath you?

A. Yes, I was.

Q. Did Gary Shipp make the ultimate decision who was hired or did the supervisor?

A. Well, there again, I was the one that made the decision, and I would always say I am going to hire this person, or this is who I recommend. And he never did overrule any decision that I made.

Q. All right. During the time that you were employed by Fort Worth Bank & Trust, did you observe any evidence that there was a plan or policy or routine by the bank to pay black employees less in comparison to nonblack employees?

A. No, sir.

Q. All right. Was the race of those employees ever a consideration as to how they were paid?

A. No, sir, it was not.

Q. Likewise, was race ever a factor in the decision to promote or not promote any particular employee?

A. No, sir, it was not.

* * * *

CROSS EXAMINATION BY MR. BRENDER

[III Tr. at Trial 36-37:]

* * * *

Q. Okay. And prior to going to work for the bank—we don't have anything in your employment record that says whether you had any previous experience in that, you know, prior to that '76 date. I am having a hard time. Your date of birth is in 55. So you were about 21 years old at that time, and you had graduated from high

school, looks like, in '74, according to page 2 of the record.

Had you been working somewhere else prior to going to work for the bank?

A. Yes, sir.

Q. Where had you been working?

A. Just various odd jobs. I had worked at Polytechnic Baptist church for a couple years, worked at Ashburn's ice cream for six or eight months, and I had worked at a drivein grocery store. You know, enough money to get me through school.

Q. Jobs you got out of high school and while you were going to college?

A. That is correct.

Q. Were you going to college full-time during those two years?

A. Yes, sir, I was.

Q. These were part-time jobs you had scooping ice cream or cleaning up the church or something of that sort?

A. That is correct.

* * * *

[III Tr. of Trial 44-45:]

* * * *

Q. But you did—and you testified here recently just a minute ago that you promoted—or you were the one that decided that Pat Cullar would get your former job; is that correct?

A. That is correct.

Q. All right. Now, I want to ask you if that was made solely on the basis of the supervisory experience of she and the other applicants?

A. No, sir, it was not.

Q. What were the other considerations?

A. Well, like I detailed a minute ago, there's always a number of things that go into any kind of promotion or trying to be a supervisor.

Q. All right. Were those the things that you named? I'll list them. It might go faster if I read them, and if you have got anything else you let me know.

But you mentioned experience, leadership, previous supervisory experience and ability to get along with others?

A. Those are the ones that come to my mind. But in any decision like that, there's maybe fifty or a hundred things that really enter into it.

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[III Tr. of Trial 47:]

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Q. All right. Was it the practice of the bank at that time to have a formal list and to make formal ratings and then to come out with a list of—you a status list or a list of who was on top rated down to the bottom? Were there any of those formal procedures at the bank at that time?

A. Not that I remember.

Q. All right. Now, you say that you interviewed each of these people personally. You brought them in, and you interviewed them. Is that correct?

A. Right.

Q. Excuse me?

A. Just a short, maybe 10, 15 minutes. You have applied for the job, and this is what we are looking for and that type of thing.

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[III Tr. of Trial 61:]

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Q. Where did you rate Clara Watson of the five applicants that you had? Obviously Pat Cullar was first because that is the one that you chose.

A. I only rated No. 1. I only chose the best applicant. I did not go through and rate one to five others.

Q. When you had these interviews, did Gary Shipp participate in the interviews in any way?

A. No, he did not.

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[III Tr. of Trial 65:]

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Q. All right. In other words, you never could see any difference based on race, now, just one race in the way the blacks and whites were performing at the bank from those that you observed?

A. In groups, no.

• • • •

[III Tr. of Trial 68:]

Q. All right. Now, did you participate in the decision to make Kevin Brown the motor bank supervisor?

A. Yes, I did.

Q. All right. And did you talk to Gary Shipp about that decision?

A. After I made it, I informed him of the decision.

Q. Once again, you made the decision, and you went to Gary and said here is what I decided to do; is that right?

A. That is correct.

Q. Yeah. Now, did you follow the same procedure that you did in the motor bank supervisor's position?

A. Yes, sir, I did.

• • • •

[III Tr. of Trial 71-72:]

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Q. You were responsible for the advancement of Kevin Brown to motor bank supervisor, as I understand it; is that correct?

A. Yes, sir, that is correct.

Q. And, as I understand the situation, he had no previous supervisory experience at the bank, and there's

some question about what his prior experience was over that.

Do you recall what that experience—he was never a supervisor of the bank prior to becoming the motor bank supervisor; is that correct?

A. That is correct, he was not a supervisor at the bank.

Q. And then with regard to his previous experience, what previous experience did he have?

A. As I remember, he worked at Six Flags over Texas.

Q. Do you know what he did there?

A. He was a supervisor over a department or a section or something like that, had about, as I recall, 30 to 40 people working for him.

Q. Did you have any information about that, other than what he put on his employment application?

A. I spoke with his previous supervisor.

Q. Who was that?

A. I don't remember the name.

Q. How do you—are you doing this by memory, or did you have some note of this?

A. I just remember—that was a process that I went through to verify his supervision.

Q. You did that at the time he was applying for this supervisory job?

A. Yes, I did.

• • • •

[III Tr. of Trial 75-76:]

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Q. Let me interrupt you for a second.

I don't want to know all the things that go into being a supervisor. I want to know what went into this decision at this time for you to deny Clara Watson the job and give to it Kevin Brown.

A. Okay.

Q. Those considerations. I don't want to know all the other considerations. I want to know all those considerations and what differences there were.

A. Okay. The ability to get along with others. Clara had had numerous problems with one lady named Lena Gray. Lena finally quit over the situation. She had problems with Edna, problems with Linda Schell, had had problems—didn't have the respect for the people. They would—they were reluctant to go to her and get checks okayed. They would go find another supervisor in the bank to answer the questions. Clara did not have the respect nor the leadership ability that Kevin had. Kevin had prior supervision experience from Six Flags Over Texas, which he had worked with approximately 30 people. I don't remember the exact amount. And he was a good teller, knew the people in the drive-in very well, and they had the respect for him. He had worked as sort of the lead person in the afternoon shift when he was there.

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REDIRECT BY MR. McGEE

[III Tr. of Trial 86-88:]

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Q. Could you tell the Court the factors that lead to your decision to promote Mrs. Cullar to the lobby supervisor position as opposed to Clara Watson?

A. Well, I think she had been with the bank for a number of years; had strong experience before she came to the bank. The main thing, she had worked as the assistant to Brian England when he was there, and worked in the lobby.

Q. All right. She was also supervisor of the motor bank tellers at the time?

A. She had moved to the motor bank and she had that experience also, and knew the people very well.

Q. In viewing the evaluation of her work as a supervisor, I suppose it would be somewhat correct to say that,

as Mr. Brender's characterized, you weren't very high on the hog on her.

A. Right.

Q. I don't know if that is really accurate, but at any rate you didn't give her high, glowing marks?

A. That is correct.

Q. All right. Given that, were you still satisfied or dissatisfied with her performance as a supervisor?

A. I think I was still satisfied.

Q. All right. Were you satisfied enough to think that she could handle the responsibilities of the inside teller supervision?

A. Yes, sir.

Q. And had you had an opportunity to observe Clara Watson's work as your assistant while you were the lobby supervisor or teller supervisor.

A. Yes, sir.

Q. All right. Were you satisfied that Clara Watson would be able to handle the responsibility as supervisor of the lobby tellers?

A. No, sir, I was not.

Q. You were satisfied that she was not able to do that or did not have the skills to do that?

A. Yes, sir.

MR. McGEE: All right. Pass the witness.

RECROSS EXAMINATION

BY MR. BRENDER:

Q. These considerations that you just told Mr. McGee applied to Pat Cullar, a number of years with the bank, that certainly applied to Clara Watson, assistant to Brian England. She was your assistant, and the only thing you have got in there was she had some supervisory experience in the motor bank, was the experience that you were responsible for her getting. Isn't that correct? Why don't those same considerations apply to

Clara Watson that you keep applying to these other people?

A. They were. Those were just a few of the factors.

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[TESTIMONY OF RICHARD ALLEN BURT AT TRIAL, UPON QUESTIONING BY THE COURT:]

[III Tr. of Trial 90-92:]

* * * *

Q. Now, did—now, you've made reference several times about the ability of the plaintiff, Watson in this case, to get along with coworkers and so forth?

A. Yes, sir.

Q. When—over what period of time did this occur?

A. I don't remember exactly when I had the complaints and all, but the main time that I was evaluating her would have been the year while I was, that I was the teller supervisor.

Q. Of course, I note in the evaluation that is referred to.

A. Yes, sir.

Q. Were your—from whom did you receive complaints?

A. Well, I received them from other tellers, such as Edna and Linda Schell and then I got complaints, like from the people that these tellers were going to, like Joy Chandler who was a supervisor in another area and fom Pat Cullar who was the supervisor in the drive-in, saying to me the tellers aren't going to Clara; they're calling me to get a decision instead of going to the one that they really should supposed to go to.

Q. Did you rely—First, did you ever talk to Clara about those complaints?

A. We discussed them when we went over the review, because it was a point—we had discussed those reviews with the employees.

Q. All right. Did you rely on those complaints in your actions in any of the matters that's before the Court?

A. I think that is a factor. I wouldn't say that was the determining factor, but it is—you know, there is a lot of things that go into making a decision and that would be one of them.

Q. Well, my question is: Did you place some reliance on these complaints?

A. Yes, sir, I did.

Q. And what were the complaints? I mean, just what did they say? In other words—and I am admitting it not for the truth of whether Clara did it or not, but the fact that you relied on what you were told about co-employees, what did the co-employees tell you?

A. Well, the complaints that I received were: when I asked her a question, she doesn't answer it properly or the answer that she gives me I can't rely on because it doesn't sound right; or possibly she won't answer them and tell them I'll get to that later; I'll get to that later and never gets back to them, or the type of not being comfortable in going to her and asking for a decision and receiving a good decision, were the complaints that I got.

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DIRECT EXAMINATION OF SYLVIA LAVONNE HARDEN BY MR. McGEE

[III Tr. of Trial 93:]

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Q. Sylvia, state your full name for the purpose of the record, please?

A. My name is Sylvia Lavonne Harden.

* * * *

[III Tr. of Trial 94:]

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Q. Mrs. Harden, how are you employed?

A. How long?

Q. How are you employed? What is your—

A. Oh, my position is assistant supervisor of the drive-in.

Q. All right. How long have you served in that capacity?

A. Uh, almost a year now, assistant supervisor.

Q. That is at Fort Worth Bank & Trust?

A. Right.

Q. Okay. Prior to serving as assistant supervisor in the drive-in or the motor bank, where were you employed in the bank?

A. Okay. I was commecial teller in the main bank, and I worked in the collection department in the main bank.

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[III Tr. of Trial 95:]

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Q. I see. When did you first come to work at Fort Worth Bank & Trust?

A. May of 78, I believe.

Q. All right. Was the bank in the current location?

A. Yes, it is.

Q. How did you learn of the opening at the bank?

A. Texas Employment Office.

[III Tr. of Trial 97-99:]

* * * *

Q. Okay. Since your employment by the bank, have you had occasion to request transfers to other positions?

A. Yes.

Q. Has the bank given consideration to your requests for transfer?

A. Yes.

Q. In fact, as I understand it, you have received a transfer?

A. Right, I have.

Q. What—from what job to what job?

A. From commercial teller to what I am now, assistant supervisor.

Q. All right. Did—you have made application previously for other promotions, have you not?

A. Yes.

Q. All right. Do you feel like you were given fair consideration for those positions?

A. I feel I was, yes.

Q. All right.

During the period of time that you have been working as approximately six years at the bank, do you feel that Fort Worth Bank & Trust has treated you fairly with regard to all of the conditions of your employment?

A. Yes.

Q. Including salary and promotion, transfer, any other area, or maybe I can phrase of it differently. Is there any area where you feel like you are treated unfairly?

A. No.

Q. The allegations—some of the allegations in this case, Ms. Harden, are that Fort Worth Bank & Trust engages in a policy or a series of practices of discrimination on the basis of race against all black employees.

Do you have an opinion whether that is true or not?

A. Not for me it is not.

Q. All right. Likewise, a similar allegation has been made about Gary Shipp, that he's the one who is responsible for the discrimination that is supposedly taking place at the bank.

Do you have an opinion as to whether that is true or not?

A. No, Gary always speaks to me. I mean, I can't say that he has discriminated against me. I cannot speak for myself.

Q. As far as you are concerned, he is not?

A. No.

Q. All right. Have you ever been given any greater workload or have any of the black employees that you

have seen been given greater work loads than similarly situated white employees?

A. Say that again.

Q. So far as you are aware, Ms. Harden, have black employees been assigned greater workloads than white employees?

A. No, not to my knowledge.

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CROSS EXAMINATION BY MR. BRENDER

[III T. of Trial 102:]

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Q. All right. Now, of course, for the record I'm not sure—I think we have discussed it but you are black; is that correct?

A. Yes, I am.

• • • •

[III Tr. of Trial 124-25:]

• • • •

Q. Do you fill out employee evaluations?

A. We work at it together. We both have our opinions and put them together and they come out as one.

Q. Pardon me. I didn't understand?

A. We both have our own opinions. She has hers and I have mine, and we put them together and we put them down.

Q. All right. How many of those have you done since you have been in that position?

A. We have three-months, and a six-months and yearly. I have done two yearly, two six-months and two three-months.

Q. All right. Do those all go before the Salary Review Committee?

A. The yearly ones go before the Salary Review but the six-months and the three-months don't.

Q. They do not?

A. No.

Q. Those are not salary-related evaluations; is that right?

A. Well, I mean the three-month one is. It goes before Helen.

Q. Before who?

A. Helen Brister.

Q. I see. Who is Helen Brister?

A. She's the director over the tellers.

Q. All right. And—all right. And have you ever appeared before the Salary Review Committee?

A. Sure.

Q. How many times?

A. Three times that I can think of.

Q. And was that with Linda Colwell?

A. Okay. One was with Linda and one without Linda.

• • • •

[TESTIMONY OF SYLVIA LAVONNE HARDEN AT TRIAL, UPON QUESTIONING BY THE COURT:]

[III Tr. of Trial 130-31:]

Q. Did you ever hear any complaints from other blacks that worked there, other than Clara?

A. What kind of complaints are you talking about?

Q. About their treatment or about not getting promoted or about salaries, or about anything with the way the bank was treating them or not treating them, or any differences being made between blacks and whites or anything of that nature?

A. No, I can't recall of any, no.

Q. Is Clara the only person that you have ever heard make a complaint——

A. Right.

Q. —about her treatment or about—from lack of promotions or things of that kind among the blacks?

A. Right, yes.

Q. Have you ever heard whites make any complaints about not getting promoted or the way they were treated?

A. Yes.

Q. What—who—how many whites? Do you recall?

A. Let me think. Someone put in for the same job I did, collection, one year. I can't recall who it was.

Q. Did you get the job?

A. I thought she should have got it.

Q. Did you get the job?

A. Yes, I got the job. They thought they should have got it.

Q. But it was a white complaining because you got the job?

A. Yes.

• • • •

DIRECT EXAMINATION OF PAULA HILL BY MR. McGEE

[III Tr. of Trial 140:]

• • • •

Q. State your full name for the record, please?

A. Paula Hill.

• • • •

[III Tr. of Trial 140-41:]

• • • •

Q. Mrs. Hill, just for purposes of the record, you are a black; are you not?

A. Yes, I am.

Q. All right. And where are you currently employed?

A. At Fort Worth Bank & Trust.

Q. All right. And what position do you hold at the bank?

A. New accounts clerk.

Q. All right. And how long have you been a new accounts clerk?

A. I have been there about three-and-a-half years.

Q. Okay. When you first came to work at Fort Worth Bank & Trust, did you start out as a new accounts clerk?

A. No, I did not.

Q. What was the first position you held?

A. I started out in bookkeeping.

Q. All right. What year did you become employed at Forth Worth Bank & Trust?

A. I started to work in 1981, I believe.

* * * *

[III Tr. of Trial 142:]

* * * *

Q. How did you learn about the job opening at Fort Worth Bank & Trust?

A. Well, actually, I just happened to pass by there one day and I thought I would stop and go in and apply for a job.

* * * *

[III Tr. of Trial 147-49:]

* * * *

Q. Mrs. Hill, do you feel speaking for yourself personally that you have been treated fairly in all areas of your employment at Forth Worth Bank & Trust?

A. Yes, I do.

Q. All right. The allegations or the primary premise of this case is that there's a pattern or a practice by the bank of discriminating against its black employees.

Are you ware of such a pattern of discrimination by the bank?

A. Well, I don't feel personally that I have been discriminated.

Q. Do you feel—do you feel that other blacks have been discriminated against?

A. No.

Q. All right. On the same direction, the allegations are that Gary Shipp is the one who has engaged in this policy of discrimination.

Has Mr. Shipp engaged in any racial discrimination against you that you are aware of?

A. No, not against me.

Q. Are you aware of him making any kind of discriminatory actions as to other black employees?

A. No, I am not.

Q. So far as you have been able to observe, there is—have all of the employees in the bank, black, white, brown or otherwise, have they all been treated essentially the same, so far as the way that the bank enforces its policy on the employees?

A. Yes.

Q. In the customer new accounts area—rather—Excuse me. How do you determine the workload? How is it assigned?

A. I feel that it's been distributed evenly among the employees there in the department.

Q. And that would be true, black or white employees?

A. Right.

• • • •

[TESTIMONY OF PAULA HILL AT TRIAL, UPON QUESTIONING BY THE COURT:]

[III Tr. of Trial 168:]

• • • •

Q. Have you heard any discussion among whites and blacks that whites get more or blacks get more or blacks get less just because one is white and one is black?

A. No, I haven't.

Q. Have you heard any complaints among—I mean, the blacks as a group that they have, have you heard any complaints that they have to do more work in a particular job than a white doing the same job has to do?

A. No, I feel like the workload is, you know, evenly spread out among everyone.

• • • •

DIRECT EXAMINATION OF JACQUELINE DANCER BY MR. McGEE

[III Tr. of Trial 170:]

• • • •

Q. State your full name for the record, please.
A. Jacqueline Dancer.
Q. Ms. Dancer, for purposes of the record, you are black, are you not?
A. Yes, I am.
Q. How are you currently employed, Ms. Dancer?
A. Currently?
Q. Uh-huh.
A. Teller.
Q. Where are you employed?
A. Fort Worth Bank & Trust.
Q. In what capacity at the bank?
A. Capacity? Teller.
Q. Are you a teller there at the bank?
A. Yes, I am.

• • • •

[III Tr. of Trial 171:]

• • • •

Q. Ms. Dancer, how long have you been employed at Forth Worth Bank & Trust?
A. It'll be five years the 22nd of July.

• • • •

[III Tr. of Trial 172:]

• • • •

Q. Now, Ms. Dancer, how did you happen to make application at Forth Worth Bank & Trust?
A. How did I? Well, I saw the job o[illegible]ning in the paper.
Q. There was an advertisement in the classified ads?
A. Yeah.

Q. What position was open?
A. Paying and receiving teller.

• • • •

[III Tr. of Trial 174-75:]

• • • •

Q. While you were there in the motor bank, was there any segregation of black employees from white employees that you observed?
A. No.
Q. Were you personally treated any differently than any other teller in the motor bank area?
A. No.
Q. Did you observe any other black tellers being treated differently than white tellers?
A. Any differently?
Q. Yes, ma'am.
A. No.

• • • •

[III Tr. of Trial 178:]

• • • •

Q. All right. I take it then that you have been treated fairly, as far as you are concerned, by the bank?
A. As far as I am concerned, yes.
Q. All right. Are you aware of any situations where black employees have not been treated fairly by the bank?
A. Not that I am aware of.
Q. All right. Are you aware of any circumstances where Gary Shipp has treated any black employees unfairly?
A. Not that I am aware of.
Q. Have your dealings with Mr. Shipp and your contact with him, has he always treated you fairly?
A. Yes, very fairly.
Q. Ms. Dancer, have you noticed any indication that black employees, tellers, for instance, are given a heavier workload than white tellers are?
A. No. I haven't ever really noticed, no.

Q. So far as you have noticed, are tellers of all races given substantially the same workload?

A. Yes. If one has too much, we help each other. It is not like, you know, one teller has so much to do and she has to do it all on her own. We all help each other. It comes out fine.

• • • •

CROSS EXAMINATION BY MR. BRENDER

[III Tr. of Trial 192:]

• • • •

Q. Okay, Well, have other people, whether you were aware of it or not, have they complained to you about discriminatory treatment at the bank? Other blacks, now, I am talking about.

A. No.

• • • •

DIRECT EXAMINATION OF PATRICIA CULLAR BY MR. McGEE

[III Tr. of Trial 200-01:]

• • • •

Q. State your full name for the record, please?

A. My name is Pat Cullar.

Q. Ms. Cullar, where do you work at this time?

A. At Fort Worth Bank & Trust.

Q. All right. And what is your title at the bank?

A. I'm assistant cashier.

Q. All right. Is that an officer position at the bank?

A. Yes, sir.

• • • •

[III Tr. of Trial 205-07:]

• • • •

Q. All right. And did you have occasion to serve as an unofficial assistant for Mr. England while you were a commercial teller?

A. Yes.

Q. Briefly what were your duties as his unofficial assistant?

A. I'd help the tellers if they had a problem, make sure the vault was closed if he was not there.

Q. You are aware, are you not, Ms. Cullar, that Clara Watson served in a similar capacity for Richard Burt?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. Okay. How did you become aware that there was going to be an opening in the motor bank supervisor position?

A. It was posted on the bulletin board.

Q. Okay. Mr. England left the bank, I think, did he not, in about 1980?

A. Yes, sir.

Q. All right. And his position came up.

Did you make application for it?

A. Yes, sir.

Q. All right. Did you receive that job?

A. No, sir.

Q. All right. Are you aware of who else may have applied for that job?

A. No, sir.

Q. All right. But Richard Burt was the person selected, was he not?

A. Yes, sir.

* * * *

[III Tr. of Trial 208-09:]

* * * *

Q. All right. I think going forward in another year in time, the—in'81, the lobby supervisor position became open when Richard Burt received a promotion to another level. Is that true?

A. Yes.

Q. And did you make application for the lobby position?

A. Yes, sir.

Q. All right. And was that an officer position at that time?

A. No, sir.

Q. All right. And do you know who the other applicants were for that lobby position?

A. No, sir.

Q. All right. But you were selected as the lobby teller?

A. Yes, sir.

Q. Or lobby teller supervisor?

A. Yes, sir.

Q. And you had served approximately a year as supervisor in the motor bank; is that correct?

A. Yes.

Q. Because of your selection as the lobby supervisor, that left a vacancy in the motor bank.

Was that job posted as being open?

A. Yes.

Q. Do you made application for that particular job?

A. I know a few that was—that did. I don't remember all.

Q. Did you participate in the selection process for that supervisor?

A. Richard and I discussed it.

Q. All right. Mr. Burt, you are talking about?

A. Mr. Burt, yes.

Q. All right. Did he ask for your recommendations as to who the best person was for the job?

A. I gave him my recommendation of who I thought.

Q. All right. And who did you recommend?

A. Kevin Brown.

Q. All right. Had you had—had you worked with Mr. Brown?

A. Yes, sir.

Q. And in what capacity?

A. I was his supervisor.

Q. All right. And that was in the motor bank?

A. Yes, sir.

Q. All right. Had he assisted you as—in a similar capacity, and you assisted Brian England?

A. Yes.

Q. About how long had he assisted you?

A. Approximately six months.

• • • •

[III Tr. of Trial 210-11:]

• • • •

Q. Ms. Cullar, did you—did you consider Mr. Brown's qualifications in making that recommendation to Mr. Burt?

A. Yes, sir.

Q. All right. Had you had an opportunity to observe him working with other people?

A. Yes, sir.

Q. All right. Were his skills as a motor bank teller of an acceptable level?

A. Yes, sir.

Q. Were they good, average, or how would you typify them, if you can?

A. Very good.

Q. All right. Did he demonstrate any ability to manage or supervise people?

A. Yes, sir.

Q. Did he have occasion to manage people, people in the motor bank while he was serving as your assistant?

A. Yes, he would close the drive-in for me.

• • • •

[III Tr. of Trial 211-14:]

• • • •

Q. Tell the Court what that means. The judge may not know what that means.

A. Okay. In the afternoons when I would leave, I would leave him in charge of the drive-in to help the—to assist the tellers with a problem with a customer, to get them money out of the vault and close the drive-in.

Q. What time is the motor bank opened up or was it then?

A. 8:00 o'clock in the morning.

Q. At what time did it close?

A. 6:00 o'clock.

Q. All right. Then, as I understand it, there are substantially two shifts that work in the motor bank; is that correct?

A. Yes, sir, at that time.

Q. All right. And did you work the first shift? I don't know whether you call it a shift or not.

A. It wasn't a shift. I worked until about—I would start at 8:00 or 8:15 and I'd leave about 4:00, 4:30.

Q. Okay. And during the period of time you were out of the motor bank, then you left Mr. Brown in charge?

A. Yes, sir.

Q. All right. Had—you have already testified that you have worked for a period of time with Clara Watson as a commercial teller.

So had you had an opportunity while working with her to observe her skills as a teller.

A. Yes, sir.

Q. All right. Did you have an opinion as to whether they were good, bad, acceptable or otherwise?

A. She was a good teller.

Q. All right. Had you also had an opportunity to observe how she dealt with her coworkers?

A. No, sir.

Q. Okay. Did you have any other opportunity to observe any other of her skills or qualifications?

A. No, sir.

Q. All right. You were familiar with her abilities as a teller?

A. Yes, sir.

Q. All right. Did you—do you recall who any of the other applicants may have been, other than Mr. Brown and Ms. Cullar—or Ms. Watson?

A. No, sir.

Q. All right. Do you recall whether or not you in your consideration, if you considered anyone other than Ms. Watson or Mr. Brown?

A. Repeat the question. I am sorry.

Q. Well, in your consideration of the person to recommend to Mr. Burt, did you—do you recall if you gave consideration to anyone other than Mr. Brown and Ms. Watson?

A. No.

Q. Okay. So you know you did not or, no, you don't recall?

A. I don't recall discussing anyone else but the two.

Q. All right. And it was your recommendation to Mr. Burt that Mr. Brown be selected; is that correct?

A. Yes.

• • • •

[III Tr. of Trial 214-18:]

• • • •

Q. During that two-year period that you were a supervisor, immediate supervisor over the tellers, did you have opportunity to hire any tellers to work for you?

A. Yes.

Q. Approximately how many people would you have hired, if you can estimate?

A. I have no idea how many.

Q. Was it one or two or was it more than that?

A. Well, a lot more than that.

Q. All right. Was it normal—were the normal circumstances for you to hire your own tellers or for someone else to interview them and hire them for you?

A. No, I interviewed them and hired them.

Q. Did you have any circumstances where anyone other than yourself hired tellers that worked under you?

A. No, sir.

Q. All right. In evaluating your employees, we've had testimony about how the evaluations are prepared and so forth.

You received those prior to the evaluation of a particular employee; is that correct?

A. Right.

Q. And did you consult with a personnel officer of the bank or Mr. Shipp or anyone to determine how you should fill out that evaluation?

A. No, sir.

Q. How do you normally fill those out? Do you take them home with you or do you sit in your office at the bank, or what do you normally do?

A. Normally in my office.

Q. All right. And, as I understand these evaluations, there are several segments to them, are there not Ms. Cullar?

A. Yes.

Q. Do you attempt to evaluate each employee on the basis of each individual characteristic or do you try to say, all right, this employee is worth X number of points and I am going to give them those points and work backwards.

In other words, I want you to tell the Court how you evaluate employees.

A. Okay. I take each question. We give examples of each question. I grade them on points, and my examples tell why I give them that point for the question, the individual teller.

Q. And prior to filling out this evaluation sheet, have you determined in advance how many points an employee is going to get, the total number of points before you fill out the—

A. The form?

Q. Yes, ma'am.

A. No, sir.

Q. All right. After you complete each question on the form, do you then total up the number of points that you have awarded and come to a total figure?

A. Yes, sir.

Q. All right. What is next down with that evaluation?

A. I go before a salary board and discuss each question and I tell them what points I give, give them my examples, and then I tell them how much the points add up, what a percent raise is and what I recommend for the raise.

Q. How many people serve on this committee?

A. Three.

Q. All right. Does the committee routinely take issue with your recommendations and change it in some fashion?

A. Sometimes we have.

Q. All right. Is that the normal practice or not?

A. No.

Q. Would it be fair to say, then, that normally your recommendation as to the particular increase is what is approved by the committee?

A. Yes, sir.

Q. In considering these evaluations, does the committee discuss the rates of the employee and does that enter into the discussion or consideration of the raise to be given?

A. No, sir.

Q. In personnel matters, do you routinely discuss them with Gary Shipp to get his approval on decisions involving your employees, black or white?

A. No, sir.

Q. Who would you go to, if you had a personnel problem?

A. I would go to Helen Brister mainly.

Q. What is Ms. Brister's title?

A. She's vice-president over operations.

Q. And is she in charge of personnel?

A. Yes.

Q. Ms. Cullar, have you received any policy on the part of Mr. Shipp or on the bank to treat its black employees any less favorably than any other employee?

A. Do I? Would I? Repeat it; I am sorry.

Q. Are you aware of any policy on the part of Mr. Shipp or Mr.—or the Fort Worth Bank & Trust to treat black employees any differently than it treats any other employees?

A. No, sir.

• • • •

CROSS EXAMINATION BY MR. BRENDER

[III Tr. of Trial 219-20:]

• • • •

Q. Okay. Now, when you went to work for the Fort Worth Bank & Trust, did you start in the—in the motor bank?

A. No, sir.

Q. You started in the lobby?

A. Yes, sir.

Q. Okay. And then were you—when did you go out to the motor bank? Were you in the motor bank prior to becoming the supervisor of the motor bank?

A. No, sir.

Q. So you had not been out and worked in the motor bank at all prior to becoming supervisor of the motor bank; is that correct?

A. I worked Saturdays and Fridays but that's all.

• • • •

[III Tr. of Trial 226-27:]

• • • •

Q. Okay. Did you ever work in the motor bank when Clara Watson worked in the motor bank?

A. I could have on Saturdays but that's—

Q. But not regularly?

A. No.

Q. Okay. So, as far as whether she had ever assisted, for instance, in the position that you mentioned, that Mr. Brown had assisted you in the motor bank, you would not be aware of that, I take it?

A. No, I would not.

• • • •

[III Tr. of Trial 232-33:]

* * * *

Q. All right. And did you have occasion to review anybody else's credentials or review their capabilities or anything else, or did you just make a recommendation to Richard Burt?

A. I just made a recommendation.

Q. You didn't take into consideration anybody else; you just said I recommend Kevin because he worked good for me out here or something of that sort. Am I correct?

A. Okay. What—

Q. Let me repeat it.

A. Okay.

Q. In other words, as I understand it, what you did is you didn't evaluate people for that position; you just recommended to Richard that Kevin Brown be the one to have the job. Is that right?

A. Yes, sir.

Q. Okay. Now, you didn't interview anybody else—Did you even interview Kevin Brown?

A. No, sir.

Q. Okay. You just suggested him for the job, really. Would that be—

A. Or recommended him.

* * * *

[III Tr. of Trial 235-36:]

* * * *

Q. Okay. Did he ever discuss with you or tell you about whether or not he had ever supervised any employees at Six Flags?

A. Yes, sir.

Q. What did he say about that experience?

A. He was a supervisor when he quit.

Q. Are you using that form that I pointed out to you right there to refresh your recollection?

A. No, sir no, sir.

Q. He was a supervisor where?

A. At Six Flags Over Texas.

Q. Who did he supervise?

A. I do not know who he supervised.

Q. Do you know the nature of his supervision work or anything?

A. No, sir.

Q. You do know they basically hire a lot of young people to work out at Six Flags every summer, do you not?

A. Yes, sir.

* * * *

[TESTIMONY OF PATRICIA CULLAR AT TRIAL, UPON QUESTIONING BY THE COURT:]

[III Tr. of Trial 253-54:]

* * * *

Q. All rght. Now, did you get any instructions from anyone in the bank about hiring people when you took over as supervisor with the right hire in the motor bank? Were you given any instructions by anyone connected with the bank as to who to hire or not to hire or—

A. No, sir.

Q. —or any matters whatsoever?

A. No, sir. I make my own decisions.

Q. Were you given any instructions as to you hire so many whites, so many males, so many females, so many blacks, so many Hispanics or anything of this kind?

A. No, sir.

Q. Were you ever told by anyone in the bank to hire blacks or not to hire blacks?

A. No, sir. I just made my decision on my applicants.

Q. On your applicants?

A. Yes, sir.

Q. And were any of the recommendations that you ever made—well, did the hiring—did the final say-so, did it have to have anyone else's final say-so before that person went to work that you hired as a teller?

A. No, sir. I gave them my recommendation, and I hired them.

Q. Who did you give the recommendation to?

A. Richard Burt.

Q. Richard Burt?

A. Because Richard Burt was my supervisor.

Q. He was your supervisor at that time?

A. Yes, sir.

Q. Did Richard ever give you any instructions about hiring?

A. No, sir.

Q. Did Mr. Shipp ever give you any instructions about hiring?

A. No, sir.

* * * *

[III Tr. of Trial 254-55:]

* * * *

Q. Now, at the time that you chose Brown as the assistant supervisor for the motor bank—and I am a little bit confused—I understood that you said that you only—that you considered Brown and the Plaintiff Watson for that position, or maybe I misunderstood in the very beginning.

A. I talked to Richard about Kevin and Ms. Watson and gave my recommendation of Kevin Brown.

Q. All right. In other words, you talked to Richard Burt about both Watson and Brown?

A. Yes, sir.

Q. And made your recommendation of Brown?

A. Yes, sir.

Q. Why did you recommend Brown over Watson?

A. I had worked with Kevin Brown. I knew what he could do as a teller. I felt he could do the job. I thought

he had experience supervising people. Clara did a good job as a teller, but I had heard complaints from tellers on her with problems.

Q. What type of complaints had you hear from tellers about Clara Watson?

A. About them getting along with her.

* * * *

RECROSS OF PATRICIA CULLAR BY MR. BRENDER

[III Tr. of Trial 261-62:]

* * * *

Q. Did you notice that the black employees were any worse employees or did their job any worse than the white employees?

A. No, sir.

Q. In other words, you couldn't say just based on race there was any difference in the way that the people performed their jobs, just looking at their race and how they performed their jobs?

A. No, sir.

* * * *

DIRECT EXAMINATION OF GARY WAYNE SHIPP BY M. McGEE

[III Tr. of Trial 263-79:]

* * * *

Q. For purposes of the record, you are the same Gary Wayne Shipp who testified previously in this case, are you not?

A. That is correct.

Q. Mr. Shipp, let me show you what has been marked as Defendant's Exhibit No. 4 and ask you to identify for the Court that exhibit and tell the Court what it is and what it represents.

A. All right. We have here a salary comparison of the start of the class date, 10-21-79, representing on that

particular page each grade, each job grade in the bank, in which there were both black and white or black and nonblack employees, showing from left to right the grade, overall average salary within that grade, including both blacks and nonblacks, black—

Q. Excuse me. Let me interrupt you, Mr. Shipp.

A. All right.

Q. What was the source for the information that is reflected on these pages?

A. Our payroll records.

Q. All right. Was that the data base that's been referred to at various times that was included in the data base?

A. Yes, it was.

Q. All right. Yet me show you also what's worked as Defendant's Exhibit 6.

MR. McGEE: And, Your Honor, I only have this copy, but it is a computer run.

BY MR. McGEE:

Q. And does that have some information in addition to the data base?

A. Okay. The data base did not include the salaries that we've put in here. The information supplied did.

Q. All right.

A. But, yes, sir.

Q. The underlying information was the payroll; is that correct?

A. Yes, sir.

Q. All right. Now, the data base uses payroll figures for 10-21-79 and 3-1 of '84; is that correct?

A. And the—I think that's all.

Q. May have some other dates?

A. I am not sure, but that's all.

Q. But of these dates that are reflected in Defendant's Exhibit No. 4, which are some—there's actually six

different exhibits that make up this Exhibit 4, are there not?

A. That is right.

Q. And that Exhibit No. 6, Defendant's 6, is the basis for this run, is it not?

A. That is correct.

Q. And so the computer run, No. 6, Defendant's 6, produced or generated these reports that is identified as No. 4; is that correct?

A. That is correct, yes.

Q. All right. Now, on each of these exhibits there are two or three or four different job grades. But I noticed that they are not grades 1 through 8 in each case.

Can you explain to the Court why the grades that are reflected differ from time to time?

A. Yes. As I said a minute ago—or what I mean to say, these are grades in which we have black employees.

Q. All right. For instance, on the very first one that shows the salary computations for grades as of 10-21-79, it shows grades 1, 2, 3 and 4. And I assume from that there were no black employees in any grades above grade 4 at that time?

A. That is correct.

Q. And, likewise, if we go back over to the last one, which is computations for grades as of March 1 of '84, I notice, for instance, that there is no entry for grade 2.

Is that because you no longer have a grade 2?

A. No. We have—We have a classification of a grade 2. There's just—there happen to be no blacks in that category.

Q. All right, fine. But you do have people working in the bank as a grade 2 but none of them are black employees?

A. I believe so, yes.

Q. All right. Now, Mr. Shipp, I'm not going to go through with you each of these exhibits, but just for purposes of the record and for the Court's understanding, each of these exhibits or each of these portions of the

exhibits reflects three figures for each grade that is shown, and that's the overall salary average and then the average of black employees and the average of non-black employees; is that correct?

A. That is correct.

MR. McGEE: All right. Your Honor, we would offer Defendant's Exhibits 4 and 6.

MR. BRENDER: No objection, Your Honor.

THE COURT: Defendant's 4 and 6 are admitted.

MR. McGEE: Your Honor, in the interest of time, I'm going to try to speed up the presentation of what is about 20 different charts that I have labeled as Defendant's Exhibit 5-A through 5—excuse me—5-T, 20 in total. And I will—

THE COURT: 5 what?

MR. McGEE: 5-A through 5—

THE COURT: T?

MR. McGEE: Yes, sir.

May I approach the witness?

I'm just going to hold these up. I realize the Court can, not only see them now, but will have the opportunity to examine them at a later time.

BY MR. McGEE:

Q. Tell the Court, Mr. Shipp, what these charts display?

A. This first chart is salary comparisons by individuals for the time period of 10-21-79, those various individuals in grade 1, salary grade 1.

Q. Let me call your attention to the first black of Defendant's Exhibit No. 4 and ask if the chart substantially displays the same thing that the first page of Exhibit 4 does?

A. Yes, it does.

Q. All right. Or should I say actually the first column of that chart.

Do you see grade 1 shows—

A. Yes.

Q. What is the average of grade 1 on that date?

A. Overall, $580.20.

Q. Find on the chart, if you would, for the Court where that writing would be reflected.

A. That overall average?

Q. Yes.

A. Is the black line here.

Q. And, likewise, it shows a black average salary of how much?

A. $550.

Q. All right. And where is that reflected on this chart?

A. Black average would be the dotted red line.

Q. And then, likewise, the nonblack average is shown, and it is the dotted blue line; is that correct?

A. Right, $600.33.

Q. This particular chart adds one dimension to the picture that is is not presented by Defendant's Exhibit No. 4; is that true?

A. That is correct.

Q. And what is that dimension?

A. Well, it shows each individual as it relates to the salary of all the other individuals in the same grade level.

Q. All right. For purposes of Defendant's Exhibit No. 5-A, which is grade 1 as of 10-21-79, we see a total of five employees who have that grade classification; is that correct?

A. That is correct.

Q. And the black employees are shown as red bars here. This is L. Smoot, which is Lee Smoot, I believe?

A. Lee Smoot, I believe.

Q. And E. Wright who would be Erma Wright?

A. That is correct.

Q. And, likewise, three nonblack employees are shown with blue bars. An R. Hyde and—

A. R. Hyde and William Lipford.

Q. Lipford?

A. Goes as Dan Lipford.

Q. But his true name is William?

A. And Ruth Joyce.

Q. Is this approach or this formula or method followed throughout each of these Defendant's Exhibits 5-A through 5-T?

A. It is, and it goes right on through each period for each grade and does the same thing.

Q. All right. As I understand it, there are some entries on this Exhibit 4 that are not charts. Can you tell the Court what those are?

A. Yes. If you will look on page 3, we show in grade 1 that we have no nonblack average salary; therefore, we did not chart that.

Q. In other words, it appears from—

A. Also on the fourth page, the same situation.

Q. What grade is that?

A. Grade 1.

Q. All right.

A. On the sixth page, I believe, grades 1 and 3, there were no blacks. So we did not chart those.

Q. Nonblacks?

A. Excuse me. Nonblacks.

Q. Okay. It appears in looking at each of those that you referred to just recently there's probably one employee in that. In other words, the average salary for that grade is also the average salary for the blacks?

A. That is correct.

Q. All right. So, obviously, there was no purpose in preparing a chart to show one person's grade?

A. That is right. This would show the same thing.

THE COURT: Let me ask you for clarification: On the charts, do these show every employee in the same grade in the—

THE WITNESS: Yes, sir.

THE COURT: —on the date given?

THE WITNESS: Yes, sir.
THE COURT: All right.

BY MR. McGEE:

Q. Let's go for another date, Mr. Shipp.
This particular exhibit, what is that? I can't see it very well.

A. It's Exhibit 5-I.

Q. All right. And the date for this one?

A. Is 3-1 of '81.

Q. All right.

A. Grade 4.

Q. All right. Have a few more employees to look at here, do we not?

A. Yes, we do.

Q. We show—there's one other indicator on here we did not talk about. There is a yellow line shown at the top of this.
What does that yellow line depict?

A. The yellow line, I believe, is on all the exhibits, and that represents the midpoint of the grade; in other words, the midpoint salary of the grade.

Q. All right. For this particular month or date, rather, there appears to be only two employees who actually are being paid at the midpoint?

A. Paid at or exceeding the midpoint, that is correct.

Q. Is that an unusual situation?

A. No.

Q. As I understand the way your salary grade ranges work, they are changed from time to time, are they not?

A. That is correct.

Q. And about how often are they changed?

A. It is really a decision made by the bank as to what the minimum salary it will hire a person with no experience in grade 1 is, and the formula that was created by our consultant starts—

Q. Let me break that down because I have heard this before, and it took me two or three times before I really followed what you were talking about.

A. All right.

Q. But let's just say that the grade 1 employee, you decide that the minimum that you are going to hire anybody at the bank today is how much, if you know?

A. I don't know.

Q. Well, let's just say for purposes of argument it's $800 a month, just to pick a figure.

A. All right.

Q. All right. You then take that as the basis for the minimum for grade 1; is that correct?

A. That is correct. Not the training minimum, but the minimum.

Q. Because there are minimums beneath the range due to training figures?

A. That is correct.

Q. Go through, then, how you adjust the other ranges in relation to grade 1.

A. Beginning with grade 1, minimum salary, there is a percentage that is applied to that to come to a midpoint, and then there's another percentage applied to that to go to maximum for that grade. And then at the time we set up our program we had to make a decision on how much difference between grade 1 minimum and grade 2 minimum and grade 3 and so on. In other words, we—I believe at that point it was like five and a half percent from the minimum of grade 1 to the minimum of grade 2, was like a five and a half percent figure, and it went that way all the way through.

Q. So if I am following you, then once you established that range for grade 1, you compute that fraction or that percentage or whatever it is, and that tells you what grade 2 should be, and you build on 2 up to 3 and so forth all the way up to the 9 pay grades?

A. Yes, sir.

THE COURT: Here again, for clarification, five and a half percent between each one?

THE WITNESS: That was, I believe, Your Honor, the one we used to begin with us.

BY MR. McGEE:

Q. Has that figure changed from time to time?

A. Yes, it has, and I cannot recall now. I think we expanded it in—oh, a couple years ago to what I think was 6 percent. In other words, we spread them.

Q. Is it possible, Mr. Shipp, that even though these ranges go up in a step progression, that someone who is, for instance, in a grade 5 and is earning above the median and perhaps at the high end of the range for grade 5 might be earning more than someone who is at the low end of grade 6?

A. That is possible, yes.

Q. Do they overlap to some extent?

A. Yes, yes.

Q. There was some testimony earlier today about somebody—I don't remember the circumstances—but that is not a common occurrence but no, sir not rare?

A. No, it is not rare.

Q. Also you substituted this—I'll step back to the podium.

You set up this program of grades and so forth back in '79 I believe was your testimony. Have all the jobs that you established as grade 1 and grade 2 and so forth all through, have those job designations remained the same throughout the administration of this program?

A. You are talking about is a teller the same grade as when we set it up?

Q. Yes, sir.

A. There are some things that have changed due to the duties of those jobs changing, and their importance to the bank as a job.

Now, some of those jobs have changed. For instance, tellers have been changed from a grade 4 originally to now they are all a grade 5.

Q. Okay. And I believe there was a change made one time with regard to customers.

A. New accounts.

Q. New accounts, yes.

A. It was a grade 4, and due to the recent changes over the years and deregulation banking and a lot of the new accounts we were offering, it was important that the job be reevaluated and became a grade 6.

Q. So it went up actually two whole grades?

A. Yes.

Q. Now, Mr. Shipp, with regard to these changes, the spacing between the grades and the changing of the jobs that are in a particular grade that are made from time to time by the bank, are they applied uniformly throughout or across the board as to all employees of the bank?

A. Absolutely, yes.

Q. In making those decisions to determine whether the new accounts job is a grade 4 or a grade 6 or the grade of teller is a grade 4 or grade 5, do you have give any consideration as to how that will impact any of your bank employees?

A. No, not at all. In fact, when you evaluate a job, you cannot even consider the people involved in that job.

Q. It is true, is it not, that you are attempting to ignore who the incumbent is for that very reason. We don't want to say this person is important to the bank; and, therefore, he or she ought to be a 6. You say what is the job, how important is the job worth.

A. What is the job worth, what is its value to the bank.

Q. And as the duties and the areas in which banking changes, those responsibilities and the value of that particular job to the bank may change by way of increase or, I suppose, decrease?

A. Yes. Mainly—Yes. Can be either way. Of course, the bank has grown, too, and that has a bearing on it also.

Q. Okay. Let me again call your attention to the charts, Mr. Shipp. And I talked about a lot of random selection yesterday. That's what I am doing now, just grabbing some that have not some people in them, rather than having . . .

Let me find one first for you that doesn't have . . . one that has a few on it.

Grade 4 as of 10-21-70, and that is Exhibit 5D; is that correct?

A. That is correct.

Q. This shows one person over at the far right who has—he's a nonbank employee, Anders, who has a rather high salary.

Could you explain to the Court why Mr.—is it Mr. Anders?

A. It is Mr. Anders.

Q. —why his salary is so much greater than any of the other people on the chart?

A. The main reason is that Mr. Anders was a security guard, and he was at the bank, and we—when we developed our salary administration program, his grade was set out at 4, but you can't—you know, it was impossible or somewhat impossible to hire anybody at that salary. I mean, he just really shouldn't have been on the chart.

Q. A rose is a rose is a rose, but maybe a grade 4 is not always a grade 4?

A. They set their own price with what they go to work for, and you either pay it or you don't.

Q. Does the bank usually hire security guards?

A. No. We contract that.

Q. So that problem, I guess, in the way the system was administered is no longer a problem?

A. That is correct.

Q. Let me call your attention to the first page of Defendant's Exhibit No. 4 where you see the averages for the grade 4 employees, overall average and the black and nonblack averages.

You'll see on nonblack it shows a $633.70 average salary; is that correct?

A. That is correct.

Q. And I suppose that exceeds the average for the overall grade.

Would Mr. Anders' presence in that nonblock group have impacted that score significantly, in your opinion?

A. Absolutely, yes.

Q. Let me show you, Mr. Shipp, Defendant's Exhibit 5P, which is the 3-1 of '83 grade 6 chart. There are a total of six employees represented, one black employee, Hill. Is that Paula Hill?

A. Yes, that is Paula Hill.

Q. She was present in court here this morning?

A. That is right.

Q. All right. And are all of these people new accounts clerks, or are there other jobs in there also?

A. There appears to be one other person there, Johnson. I believe that's Don Johnson.

Q. She's a grade 6 also. What is her job?

A. In 3-1 of '83, she was, I believe, assistant supervisor or in bookkeeping.

Q. All right. This Watson that's shown as the fourth from the left, that is not Clara Watson, is it?

A. No. That is Patricia Watson.

Q. All right. Now, just to demonstrate for the Court how percentages can be affected rather significantly by changes of one person, let's look to the 3-1 of '83 entry on Defendant's Exhibit No. 4, which is the next to the last page, and call your attention to grade 6. And the average for nonblacks is $971, and the average for blacks is $950.

That average was Paula Hill, wasn't it; there was only one?

A. There was only one, right.

Q. Let's flip over on 3-1 of '84 for grade 6.

This demonstrates Paula Hill has apparently received an increase.

Flip over to the last page of Defendant's Exhibit 4, and she now shows to be almost in the middle of the range. There are two employees that earn slightly more than she does, and two employees that earn slightly less. Is that correct?

A. That is correct.

Q. All right. And just to carry it a little bit further, here is another situation. That is 5-T, Defendant's Exhibit 5-T for 3-1 of '84 on grade 7.

A. That is right.

Q. Likewise, one employee in that range appears—or this is Sylvia Harden, is it not?

A. That is correct.

Q. She appears to be making the same as one non-black employee, greater than another, and less than some others?

A. Correct.

Q. All right. And without going into the rest of these, Mr. Shipp, this procedure was followed throughout each of these exhibits, Defendent's Exhibit 5-A through -T?

A. Yes, it was.

MR. McGEE: Your Honor, we would offer Defendant's Exhibits 5-A through 5-T.

MR. BRENDER: No objection, Your Honor.

THE COURT: Admitted.

* * * *

CROSS EXAMINATION BY MR. BRENDER

[III Tr. of Trial 307-08:]

* * * *

Q. Can you explain why blacks have lower average evaluations than whites do?

A. Can I explain why?

No, I can't.

Q. All right.

A. Their job performance is the only thing that it can be, period.

Q. From your observation in the bank, I take it when you say no you can't explain it, when you have not noticed yourself any lower performance on behalf of blacks than on whites?

A. Not until we sat down and put this all together in the data base.

Q. So you did do that, you did average those and look at what those things were?

A. Sure did.

Q. Before you came to Court?

A. Sure did.

Q. So you had that information, and you had some of those averages and percentage and do some of those things, but you chose not to have them analyzed to see what the statistical significance of those things were before you came to court. Is that right?

A. That is correct, that is correct.

* * * *

[III Tr. of Trial 318-20:]

* * * *

Q. You were here and present in court when I went over with Dr. Tom Marshall from Your Defendant's Exhibit 2 what the applicant flow was, both black and non-black, for these 35 jobs that you had selected out, and you had gone up two weeks and selected all the applicants, right; you gave us these figures?

A. I was present when you talked to him, yes.

Q. You had looked at this applicant flow just like you did the statistical—I mean, just like you did the salary evaluations and all the other data, and you or somebody that was assisting you had figured out these rates of hire for blacks and whites were not particularly favorable to the bank's position, had you not?

A. I'm not sure what we referred to. Referring to those numbers right there?

Q. Yeah, that Exhibit 42 there.

A. On what basis were they not favorable?

Q. That the black hire rate or white hire rate is about three times that of the blacks in just about every instance.

A. I don't know if there's—I can't tell you if that is favorable or not favorable.

Q. You mean you think it is all right that you are hiring blacks at a rate that is one third that of whites?

A. I am not saying it is all right.

Q. All right, but you didn't think that that indicated discrimination in your hiring practices?

A. I don't think so, no.

Q. You don't think so?

A. Not at all.

Q. You think that is acceptable?

A. That is the way it was done.

Q. And based on that, you wouldn't say—because you feel it is acceptable, I take it you wouldn't have any reason to change the bank's practices; is that right?

A. I certainly would not.

Q. And we could say the same thing about the figures on Plaintiff's Exhibit 43, which were also the figures that you have no Defendant's Exhibit 2; is that right?

A. I believe—What was the question?

Q. Well, would your feeling be the same, there shouldn't be anything done or changed, given the rates of hire of blacks and nonblacks on Exhibit 43, which was taken from the—the numbers were taken from your Defendant's Exhibit 2?

A. No, I don't see anything we need to change, except keep a little better records on whether there was a job opening and someone comes and applies.

Q. You don't feel like there is discrimination occurring at the bank such that you ought to do something about it or such as seek blacks or any positions or do something about it—actually, you are getting a good applicant flow—and do something about your hiring practices; you see no reason to do that, do you?

A. I certainly do not.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

(Title Omitted in Printing)

MEMORANDUM OPINION AND ORDER

There is pending before the Court plaintiff's motion for class certification. A hearing on said motion was held on June 17, 1982. After careful consideration of the motion, arguments, and brief the Court makes the following ruling.

I. *Subject Matter Jurisdiction*

Plaintiff brings this case claiming that defendant, Fort Worth Bank and Trust, unlawfully discriminates against Blacks in hiring, compensation, initial placement, promotions, termination, departmental segregation, leave policy, and other terms and conditions of employment. Plaintiff has moved to certify as a class all those who are similarly situated to plaintiff.

Defendant asserts that subject matter jurisdiction over the Title VII class claim is lacking where plaintiff presented no class allegations to the EEOC at the administrative level, and the EEOC investigated only the plaintiff's individual claims of discrimination. The Court disagrees. The proper scope of the judicial complaint in a Title VII action is limited to the scope of the EEOC investigation which can "reasonably be expected to grow out of the charge of discrimination." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970). The Court finds that all claims now brought by plaintiff in this class action are *either* issues that were raised by plaintiff in her administrative complaint, *or* they are "issues that

may reasonably be expected to grow out of the administrative investigation" of her administrative complaint. *Eastland v. Tennessee Valley Authority*, 553 F.2d 364, 372 (5th Cir. 1977). As the Fifth Circuit stated in *Hebert v. Monsanto Co.*, 682 F.2d 1111 (5th Cir. 1982):

> Contrary to defendants' contention that a plaintiff may raise only the issues raised in the charge filed with the EEOC and investigated by the EEOC, a plaintiff may raise issues in his judicial complaint which were not investigated by the EEOC so long as the issues are like or related to the allegations in the charge, or could reasonably be expected to grow out of the charge of discrimination.

Hebert at 1133.

Thus, the Court finds it has jurisdiction over these claims.

II. *Prerequisites of Rule 23*

In order for a class to be certified the plaintiff must prove at a class certification hearing a ..... Rule 23(a), Federal Rules of Civil Procedure and the class ..... within one of the categories of class actions set forth in Rule 23(b), F.R.C.P. *General Telephone Company of the Southwest v. Falcon*, 102 S.Ct. 2364 (1982).

Thus, the sole question before the Court is whether plaintiff has met the burden of showing that the prerequisites of Rule 23, F.R.C.P. have been satisfied.

A. *Numerosity.*

Under Rule 23(a)(1) F.R.C.P., plaintiff must prove that the class is so numerous that joinder of all members is impracticable. However, [i]t is not necessary that the members of the class be so clearly identified that any member can be presently ascertained." *Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir. 1970). *See also Jones v. Diamond*, 579 F.2d 1090, 1100 (5th Cir. 1975); *Mertz*

v. Harris, 497 F.Supp. 1134 (S.D. Texas 1970). Plaintiff produced evidence at the hearing which indicates that the class would constitute over one hundred people (See Plaintiff's Exhibits #1 and #2). Using defendant's position that the opening date for membership in a Section 1981 class in this case is October 21, 1979, the Court counts 4 blacks who would be members of the class from 1979, 42 blacks who would be members of the class from 1980, 48 blacks who would be members of the class from 1981, and at least 9 blacks in the class from 1982 (the figures are incomplete for 1982 and the Court anticipates the possible addition of blacks to the class from June 1982 to the present date). See Plaintiff's Exhibits #1 and #2. In addition, plaintiff testified that some blacks approached the bank for application forms and were not given those forms. These would not be included in the figures discussed above since Plaintiff's Exhibit #1 is an "Applicant Flow Log" based on the number of applications which were actually completed and returned. Furthermore, the 15 black employees whom defendant hired since October 21, 1979 (see Defendant's Motion and Memorandum of Authorities in Opposition to Class Certification, note 12 at page 51) would also be members of the class, as persons subject to promotional discrimination. Thus, the Court holds that plaintiff has met the numerosity prerequisite.

B. *Common Questions of Law or Fact*

Under Rule 23(a)(2), plaintiff must prove that "there are questions of law or fact common to the class."

Defendant asserts that the individual Clara Watson, in her claim of promotional discrimination has no "commonality" with those possible claims by other blacks who applied, but were not even hired as employees of defendant. However, defendant concedes that the recent Supreme Court decision in *Falcon* does not "absolutely preclude certification of an across-the-board class" (Defendant's Motion and Memorandum of Authorities in Opposi-

tion to Class Certification at page 9), and instead requires plaintiff to present specific facts supporting each of the prerequisites of Rule 23. As the Supreme Court stated in *Falcon*:

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision making processes.

Falcon, n.15 at 2371.

Plaintiff, at this stage, has presented exactly that type of evidence. It should be noted that the plaintiff in *Falcon* had "no allegation that those who made the hiring decisions are the same persons who determined who was promoted to field inspector. Thus there is no claim that the same person or persons who made the challenged decisions were motivated by prejudice against Mexican-Americans, and that this prejudice manifested itself in both the hiring decisions and the decisions not to promote respondent." *Falcon* at 2373.

In contrast to the plaintiff in *Falcon*, plaintiff in the present case had presented evidence suggesting that Mr. Gary Shipp is responsible for both the hiring and promotion at defendant bank, and has been for over five years. Although Mr. Shipp did testify that the supervisors of the respective departments made hiring decision (Tr. at 167) he also explained:

> Question by Mr. Brender: Okay. And I take it on personnel decisions, hiring, determination, et. cetera, you obviously ask for input from others within the bank, but I take it you have the ultimate final say in those decisions, is that correct?

Answer by Mr. Shipp: Yes, I discuss it with the supervisors when a decision is made by them.

(Tr. at 140)

Although defendant asserts that Mr. Shipp does not make the hiring decisions, it is obvious he does have "input" into those decisions, with the potential to "sway" or otherwise influence their outcome through his discussions with the supervisors. The evidence before the Court shows that Mr. Shipp reports directly to the bank officers and has never advanced a black to a position of supervisor. His alleged comments to plaintiff Clara Watson about the ability of blacks to handle large amounts of money drew conflicting evidence at the hearing, but the evidence at least suggests there is a question of fact here to be resolved, which is common to both plaintiff and other blacks who applied and were not hired at defendant bank. However, the Court wants to strongly point out that this holding is in no way a ruling on the merits of plaintiff's contention, and that the evidence has merely shown a tendency that defendant may have discriminated against blacks in hiring and promotional decisions. *See Vuyanich v. Republic National Bank of Dallas*, 82 F.R.D. 420 (N.D. ..... 1979).

C. *Typicality*

Under Rule 23(a)(3), plaintiff must show that "the claims or defenses of the representative parties are typical of the claims or defenses" of the class.

Again the Court finds conflicting evidence as in the issue of hiring practices. While plaintiff testified that certain named blacks were denied the opportunity to make application to work for defendant bank and other named blacks were turned down for employment, defendant asserts that these names do not appear on the flow chart and Mr. Shipp testified that no one was denied an application. Thus, there is at least a question of fact to be resolved on this point.

Also, defendant attacks the statistics and binomial test offered by plaintiff as not being limited to the relevant time frame (October 21, 1979, to May 1982), and further as being based purely on randomness, rather than taking into account the respective qualifications of the applicants who comprised the applicant pool.

The Court has reexamined Plaintiff's Exhibit No. 1, to consider the statistics of the time period from October 21, 1979, to May 1982. Such a reconsideration results in the following figures by this Court's calculations of Job Applicants:

	Black	White	Total
1979 (Oct. 21-Dec.)	4	9	13
1980	42	161	203
1981	48	147	195
1982 (Jan.-May)	9	41	50
	103	358	461

This yields 22% of the total of job applicants being black applicants and 78% of the total of job applicants being white applicants. This does not vary greatly from the original 24.7% black applicants and 75% white applicants presented in Plaintiff's Exhibit #2.

A recalculation of "Hirees" from October 21, 1979 results in the following:

	Black	White	Total
1979 (Oct.-Dec.)	0	3	3
1980	1	22	23
1981	1	21	22
1982 (Jan.-May)	0	3	3
	2	49	51

This yields approximately 4% of the total number of hirees being black. That compares unfavorably with the Plaintiff's Exhibit #2 showing 9% of total hirees being black.

Although this Court will not attempt to recalculate the probability of a pool of applicants with 22% blacks resulting in a total number of hirees of which 4% are black, the Court will at least recognize that the probability of this event happening at random would be even less than the probability which was given to plaintiff's original figures in its exhibit no. 2. (a pool of applicants with 22.5% blacks, resulting in a total number of hirees of which 9% are black)

Defendant also attacks the "randomness" of the statistics, stating that statistics must reflect the qualifications of the applications. However, Mr. Shipp testified that there were "no specific qualifications" at entry level positions for applicants (Tr. at 167), and he further testified that he had no knowledge of a fewer number of blacks being qualified than whites qualified among those who left their applications at his bank. (Tr. at 157).

Again the Court stresses that it is not ruling on the merits of plaintiff's complaint, but that it is finding enough evidence to suggest an inference that there is a possibility of racial discrimination in these hiring decisions.

With regard to promotions, plaintiff has testified as to her own experience of applying for promotions and being denied the promotion, which went to a white applicant on numerous occasions (Tr. at 22-38). There is no question such experience would be "typical" of other blacks who have requested and been denied promotions.

Furthermore, defendant has not offered statistics to rebutt plaintiff's statistics on hiring and promotions. When asked if he had used statistical tests for race in his preparation for the class certification hearing, defendant's statistician, Mr. John Sennetti replied he had performed those tests, but had not brought the computer sheets with him, stating "Because they were not important. If race is not significant, I thought—and in fact, I was instructed to bring the variables that were important." (Tr. 244)

Plaintiff also asserts that the *compensation* for bank employees reveals racial discrimination. Here the Court has more difficulty. The statistics offered by defendant which compare salaries of other employees to those of plaintiff (and compare salaries of blacks and whites) would tend to show the defendant's position of denial *as to discrimination in compensation* is perhaps correct. As to the compensation issue, the Court finds the following comment in *Vuyanich v. Republic National Bank* to be appropriate:

> The Bank's evidence introduced to rebut plaintiff's statistics tends to show that its position of denial may not be insubstantial. But the sum of plaintiffs and defendants statistics points to the conclusion that in the liability phase of this proceeding, the Court will have the duty of resolving certain contested issues of fact and law; that is, common questions do exist.

Vuyanich at 431-432.

Finally, in the area of initial placement, work assignments, terminations, departmental segregation, and leave policy, the Court is impressed with defendant's rebuttal evidence. The Court must at this time, however, find plaintiff has alleged facts, which, if true, might show a policy of racial discrimination in these areas.

The Court notes that the typicality requirement does not require that an identical harm result from the same type of practice. *Vuyanich* at 433. *See also, Satterwhite v. City of Greenville*, 478 F.2d 984 (5th Cir. 1978). Thus, the Court holds that plaintiff has submitted enough evidence to meet the typicality prerequisite.

D. *Adequate Representation*

Under 23(a)(4), plaintiff must show that "the representative parties will fairly and adequately protect the interests of the class." This factor is usually analyzed

from two perspectives; from the standpoint of the class representative and from the standpoint of the class representative's attorney. Adequacy of class representation is crucial to assure that the absent class members are not deprived of due process and that the final judgment is binding. *Hansberry v. Lee*, 311 U.S. 32 (1940).

As to plaintiff herself, there is no contention that her interests are antagonistic to the class or that she is involved in a collusive suit. The test of adequacy is that the representative must be of such a character as to assure the vigorous prosecution of the action so that the class member's rights are certain to be protected. *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973); *Scott v. City of Anniston*, 90 F.R.D. 267, 281 (N.D. Ala. 1981).

The Court finds that plaintiff has sufficient knowledge of this suit and has sufficient interest so that she would "vigorously litigate the suit." *Hernandez v. United Fire Insurance Co.*, 79 F.R.D. 419 (N.D. Ill. 1978). As far as the actual funding of the costs of suit, the Court finds that the arrangement between plaintiff and her attorney is both proper and would make available enough funds to litigate the suit. *See* American Bar Association, Committee on Ethics and Professional Responsibility, Informal Opinions 1283, 1284 and 1326.

Plaintiff's attorney is a member of a two man law office which has a large number of open files. The Court has some doubt as to his capacity, as far as time is concerned, in handling this case. However, plaintiff's attorney has appeared before this Court on several occasions, including class action suits, and the Court has found him to represent his clients fully and capably. The Court finds that this latter factor, at least at this point, outweighs any doubts the Court has about quality of representation which would be provided to the class members.

Thus, the Court finds that plaintiff has submitted enough evidence to meet the adequate representation requirements.

E. *Action on Grounds Generally Applicable to the Class*

Since the Court has found that plaintiff met the prerequisites of 23(a), the Court must also find that plaintiff meets the requirement of 23(b)(2), before the class can be certified. *See Hugg v. N.D. Cass Co.*, 485 F.2d 710, 712 (5th Cir. 1973).

Under 23(b)(2) plaintiff must show that defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

As stated by Judge Higginbotham:

> The term "generally applicable" has been interpreted to mean "that the party opposing the class does not have to act directly against each member of the class. As long as his actions would affect all persons similarly, his acts apply generally to the whole class" . . . Rule 23(b)(2) is closely linked to the 23(a)(2) requirement that the plaintiff show existence of a class raising "common questions of law or fact."

Quigley v. Braniff Airways, Inc., 85 F.R.D. 74, 79 (N.D. Tex. 1979).

The Court has already found that plaintiff met the requirements of 23(a)(2), and that finding and the discussion as to that finding are directly applicable to the (b)(2) prerequisite. The Court finds that plaintiff has shown that defendant acted in a way which applies generally to the whole class.

However, it should be kept in mind, as pointed out by Judge Higginbotham:

> that at this stage of the proceeding the issues are whether common questions exist and whether the defendant allegedly acted or failed to act in a man-

ner generally applicable to the class—not whether the defendant is actually guilty of discrimination.

Quigley v. Braniff Airways, Inc., supra at 79.

F. *Class Description*

The description of the class must be sufficiently definite so that it is administratively feasible for the Court to determine whether a particular individual is a member. *See De Bremaecker v. Short*, 433 F.2d 733 (5th Cir. 1970); *Barlow v. Marion County Hospital District*, 88 F.R.D. 619 (M.D. Fla. 1980).

1. *Relief Sought*

As far as plaintiff's claim for injunctive and declaratory relief, the Court is not opposed to amorphous or indeterminate class definition. However, as to plaintiff's claim for back pay, benefits, and damages, the Court expresses deep concern that such relief will be received by those who are not really entitled to such relief, if the definition of the class is broadly drawn. It is quite possibly true that some Blacks were treated fairly and on an equal basis with Whites, therefore as to them such monetary relief would not be equitable The Court will therefore, conditionally certify the class as to the issue of monetary relief and await the outcome of further discovery and the trial on the merits to determine whether such relief is feasible and justified.

2. *Time*

Defendant asserts that the opening date for this class is October 21, 1979. Indeed, the Court has examined evidence presented by plaintiff involving dates subsequent to October 21, 1979 to determine if a class should be certified. However, plaintiff has offered credible evidence tending to show the defendant discriminated against Blacks as early as January 28, 1979, and asserts that the United States Supreme Court Opinion in *Zipes v.*

Trans World Airlines, Inc., 102 S.Ct. 1127 (1982) supports the proposition that the opening date for class membership may be earlier than that indicated by statutes of limitation. Plaintiff is correct that the Supreme Court stated the filing of a "timely charge of discrimination with the EEOC [was] not a jurisdiction prerequisite to suit in federal court," *Zipes* at 1132, however, the Court sees no evidence that waiver, estoppel, or equitable tolling should apply in this case. Thus the opening date for class membership is October 21, 1979. *See Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 813-15 (5th Cir. 1982)

III. *Conclusion*

The Court hereby CERTIFIES the following Rule 23 (b)(2) Class

All Blacks

(a) presently employed by defendant; or

(b) who have, at anytime since October 21, 1979, been employed or sought employment with defendant;

(c) who may in the future seek employment by defendant.

Signed this 3 day of March, 1983.

/s/ Eldon B. Mahon.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

(Title Omitted in Printing)

MEMORANDUM OPINION

Plaintiff Clara Watson, a black female, alleges that Defendant Fort Worth Bank and Trust discriminated against her and other persons similarly situated on the basis of race, in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The Court certified a class consisting of blacks who applied to or were employed by defendant on or after October 21, 1979 or who may submit employment applications to defendant in the future. Plaintiff seeks declaratory and injunctive relief, back pay and benefits. Defendant denies discriminating against plaintiff or other black employees or applicants and, further, alleges that the class is overbroad and does not comply with the requirements of Rule 23 of the Federal Rules of Civil Procedure.

Findings of Fact

1. Plaintiff Clara Watson is a black female resident of Tarrant County, Texas.

2. Defendant Fort Worth Bank and Trust is a banking corporation that is incorporated under the laws of the state of Texas and is doing business in Tarrant County, Texas.

3. Plaintiff has a high school education and nine hours of college credit in business related courses. She worked as a cashier at Montgomery Wards department store for nine years before being employed by defendant.

4. Plaintiff was hired by defendant on August 17, 1973 as a proof operator. Approximately two years later she was promoted to the position of teller trainee. After a two to three month training period she became a teller in defendant's motor bank on January 1, 1976. She was transferred to the Bank's main lobby in late 1979 and was promoted to the position of commercial teller on February 2, 1980.

5. In February 1980 the position of supervisor of tellers became open due to the the resignation of Assistant Cashier Brian England. The position involved supervision of approximately eleven tellers in the Bank's main lobby. In addition, the motor bank supervisor, who had authority over approximately six tellers in the motor bank, reported to the teller supervisor. Among the persons who applied for the position were plaintiff; Richard Burt, a white male who was supervisor of the bookkeeping department; Gail Levitt, a white female who was supervisor of tellers in the motor bank; and Pat Cullar, a white female commercial teller.

6. Until February 1981 the teller supervisor reported directly to Gary Shipp, who has been a senior vice president and cashier at the Bank since 1977. Accordingly, Gary Shipp made the decision in February 1980 of whom to promote to the teller supervisor position.

7. Shipp selected Richard Burt as England's replacement as teller supervisor. Burt was hired by the Bank in May 1976 as a part-time teller in the motor bank. At that time he was a full-time student at Texas Wesleyan College. Beginning in January 1977 he was a full-time employee in the general ledger department for approximately one year and then worked as a credit analyst for six months. He became supervisor of the bookkeeping department in 1979. Burt obtained a bachelor's degree in banking and finance from Texas Wesleyan College in May 1980.

8. On December 20, 1979 Gary Shipp had evaluated Burt's performance as a supervisor as "competent" to

"commendable" and his potential as "considerable" to "outstanding."

9. Also in February 1980 Gail Levitt resigned from her position as supervisor of tellers in the motor bank. Six or seven persons applied, among them plaintiff and Pat Cullar, who was selected for the position.

10. Both plaintiff and Pat Cullar were commercial tellers when the motor bank supervisor position came open in February 1980. Plaintiff had worked for the Bank for six and a half years compared to Cullar's two and a half. However, Cullar had almost eighteen years experience in banking in Wichita Falls, Texas and Fort Worth, Texas, with more than sixteen years experience in all teller areas, while plaintiff had less than seven years banking experience. Plaintiff's job performance rating by her supervisor, Gail Levitt, in August 1979 and Cullar's rating by her supervisor, Brian England, in September 1979 resulted in comparable ratings. Out of a potential score of 104 points in ten categories, plaintiff scored 70 and Cullar scored 72. Both plaintiff and Cullar had been given low ratings on their ability to get along with supervisors and coworkers on the job. Their records and qualifications were substantially the same, except for Cullar's more extensive banking experience.

11. Shortly after Burt's selection as teller supervisor, plaintiff was given additional duties and responsibilities as his unofficial assistant. Among her duties were making work assignments, authorizing the payment of checks drawn in excess of a specific amount and helping other tellers with discrepancies in their accounts. Cullar had acted in the same capacity with respect to Brian England when he was her supervisor in the lobby. While working as Burt's assistant, plaintiff experienced some resentment from other tellers in connection with the performance of her supervisory duties. Although it was plaintiff's function to approve checks when Burt was unavailable to do so, some of the other lobby tellers routinely bypassed plaintiff and had their checks approved by the

drive-in supervisor, Pat Cullar, or the bookkeeping supervisor.

12. In January 1981 plaintiff took a leave of absence from her employment with the Bank to undergo foot surgery.

13. While plaintiff was on leave in January 1981 Burt was promoted to assistant vice president in charge of operations. His promotion necessitated the posting of the lobby teller supervisor position. Among the applicants were plaintiff; Cullar; Sylvia Hardin, a black female commercial teller; and Patsy Weatherly, a white female who was supervisor of the proof department. Richard Burt chose Pat Cullar to replace him.

14. As a result of Cullar's promotion, the motor bank supervisor position came open. Among the applicants were plaintiff, Hardin and Kevin Brown, a white male teller in the motor bank. Based on Cullar's recommendation, Burt selected Brown for the position.

15. Kevin Brown was hired as a part-time teller in the motor bank on October 29, 1979, when he was twenty years old. He became a full-time teller in the motor bank on May 15, 1980 and served as Cullar's assistant for six months. His previous experience included seven months as a salesperson at Monnig's department store and approximately four years at Six Flags Over Texas, including some work as a supervisor of teenage seasonal employees.

16. Brown's employment performance was rated by Cullar in January 1980, scoring 80 points out of a possible 104, and in January 1981, scoring 89 points out of 104. Richard Burt gave plaintiff a rating of 84 in July 1980, which was her last written evaluation.

17. Plaintiff filed a charge of discrimination with the Fort Worth Human Relations Commission and the EEOC on January 28, 1981. A notice of right to sue was issued on September 24, 1981 and plaintiff filed suit on October 21, 1981.

18. Plaintiff did not return to work after taking sick leave in January 1981. She underwent two operations on her foot and resigned on August 7, 1981.

19. In September 1981 Pat Cullar rated Kevin Brown's performance as motor bank supervisor as "fair" and his potential as "some." He submitted his resignation on December 3, 1981.

20. Since 1975 the Bank has not had a black director or officer. There has been one black supervisor, Sylvia Hardin, who became assistant supervisor of the motor bank in October 1983.

21. In 1981 the Bank employed 68 whites and 9 blacks. In 1982 the Bank employed 72 whites and 9 blacks. In 1983 the Bank employed 71 whites and 7 blacks. Nine blacks and 71 whites were employed at the time of trial.

22. On March 4, 1983 the Court certified a class consisting of all backs who have been employed by or applied for employment with the Bank since October 21, 1979 or who may apply to the Bank in the future. The Court found that the class of applicants numbered over 100 and the class of blacks who were currently employed by the Bank or who had been employed by the Bank numbered fifteen as of June 1982.

23. Hiring decisions at the Bank are made by the department supervisors, who then submit their decisions to Gary Shipp for formal approval. Shipp rarely vetoes hiring decisions made by those supervisors reporting to him. Shipp personally interviews some applicants but makes the final hiring decisions only for those persons working directly under his supervision. During all periods relevant to this suit, Shipp had final authority over all personnel matters.

24. Performance evaluations and promotion decisions are made by the supervisors for those employees under their authority. Since 1978 employees have been given yearly written evaluations which are completed by their supervisors. Salary increases are calculated on the basis

of the performance ratings. The supervisors present the evaluations to the Salary Review Committee, which consists of the president or executive vice president of the Bank, the officer in charge of personnel and the senior operations officer. Occasionally a change in the Supervisor's rating is made, with the concurrence of the full committee. Gary Shipp has been a member of the Salary Review Committee during the entire period relevant to this case. However, he has no more influence over the employee ratings than do the two other committee members.

25. Any findings of fact which should be a conclusion of law is hereby made a conclusion of law.

Conclusions of Law

1. This Court has jurisdiction over the subject matter of this action pursuant to 42 U.S.C. § 2000e-5, 42 U.S.C. § 1981 and 28 U.S.C. § 1343. Venue is proper in the Northern District of Texas.

2. Defendant Fort Worth Bank and Trust is an employer within the meaning of 42 U.S.C. § 2000e(b).

3. Plaintiff complied with the procedural requirements for filing a Title VII claim pursuant to 42 U.S.C. § 2000e-5 by timely filing an EEOC complaint and by filing her suit within 90 days of receipt of a notice of right to sue.

4. The elements of proof under § 1981 and Title VII are the same. *Whiting v. Jackson State University*, 616 F.2d 116, 121 (5th Cir. 1980).

5. Plaintiff must carry the initial burden of establishing a prima facie case of discrimination. She must show (i) that she belongs to a protected group; (ii) that she applied and was qualified for a job for which the employer was seeking applicants; (iii) that she was rejected, despite her qualifications; and (iv) that after her rejection, the position remained open and the employer continued to seek and/or select an applicant with similar qualifications. *McDonnell Douglas Corporation v. Green*,

411 U.S. 792, 802 (1973); *Canino v. United States Equal Employment Opportunity Commission*, 707 F.2d 468, 470 (5th Cir. 1982). If a plaintiff proves a prima facie case, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment decision. The defendant's burden is relatively light, in that "the defendant need not persuade the court that it was actually motivated by the proffered reasons . . . it is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

If the defendant does not present sufficient evidence to raise a genuine issue of fact as to whether it discriminated, the plaintiff prevails. If the defendant does succeed in rebutting the presumption of discrimination, the burden shifts back to the plaintiff to show that the defendant's stated reason was a pretext for discrimination. She may prove this by showing that race played an impermissible role in the employment decision or by showing that the nondiscriminatory reasons offered are not credible. *Lincoln v. Board of Regents of University System*, 697 F.2d 928, 938 (11th Cir. 1983).

6. Plaintiff has presented a prima facie case of individual employment discrimination. She is a member of a protected class, she applied for and was qualified for the position of lobby supervisor and motor bank supervisor in 1980 and 1981 and she was not selected.

7. Defendant has met its burden of proof by presenting legitimate nondiscriminatory reasons for each employment decision. Richard Burt had worked as a teller and had supervisory experience at the Bank, he had been given excellent performance evaluations and he was nearing completion of a college degree in banking and finance when he was promoted to teller supervisor in February 1980. Although plaintiff and Patricia Cullar had been given almost identical employee ratings, defend-

ant offered a nondiscriminatory reason for preferring Cullar for the motor bank position in February 1980 on the ground that she had eleven more years experience in banking than plaintiff had. The Bank had a legitimate reason for choosing Cullar over plaintiff for teller supervisor in February 1981 because of her experience as motor bank supervisor.

The Court is more troubled by the Bank's decision to promote Kevin Brown instead of plaintiff to motor bank supervisor in February 1981. As is evident by Brown's poor rating as supervisor and his subsequent resignation, hindsight shows his promotion to be an unwise decision. However, in order to satisfy its burden of proof the Bank need only articulate legitimate, nondiscriminatory reasons for Brown's promotion. The record shows that Cullar regarded Brown highly for his performance as a teller in the motor bank and his experience as her assistant. Further, he got along well with other employees, while plaintiff had had some difficulty in her relationship with coworkers and with tellers whom she supervised as Burt's assistant. The Bank also relied on Brown's experience supervising thirty to forty temporary workers at Six Flags Over Texas. Finally, the Court notes that plaintiff was out on sick leave when the lobby and motor bank positions came open in 1981 and that she subsequently underwent surgery on her foot twice. In contrast, Brown was available immediately to assume the motor bank position. Accordingly, the Court finds that, in retrospect, the promotion of Brown was a poor judgment call but that defendant had legitimate, nondiscriminatory reasons for making such a decision.

8. Plaintiff has not shown that the reasons articulated by the defendant for choosing Burt, Cullar and Brown over her were pretexts for racial discrimination.

9. A class action must satisfy the prerequisites set out in Fed. R. Civ. P. 23(a): (1) the class is so numerous that joinder is impracticable; (2) there are common questions of law or fact; (3) the claims or defenses of

the class representative are typical of those of the class; and (4) the representative will fairly and adequately represent the interests of the class. Until recently, courts have been more lenient in finding compliance with Rule 23 in Title VII cases than in other types of cases, permitting the named plaintiff to raise across-the-board *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982) the Court held that employment discrimination class actions, like all other class actions, must comply with the requirements of typicality and commonality. The Court found that because adjudication of Falcon's claim of discrimination in promotion on the basis of his Mexican-American origin would not require decisions of common questions of law or fact regarding discrimination against Mexican-Americans in hiring, Falcon could not bring a class action on behalf of both groups. As a result of the *Falcon* decision, the fact that a plaintiff is a member of an identifiable class of persons of the same race, sex, or national origin is in itself no longer sufficient to establish standing to litigate on behalf of the class all possible discrimination claims against their common employer. Discrimination on the basis of sex, race or national origin is no longer by its nature perceived as class discrimination.

Although the effect of the *Falcon* decision was to limit across-the-board attacks on a company's employment policies, the Court did not foreclose all such actions. In footnote 15, which has been the basis for carving out exceptions to the decision, the Court held that

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision making practices.

Id. at 159, n.5. In his opinion in which he concurred in part and dissented in part Chief Justice Burger inferred that an allegation that the same person made both the hiring decisions and the promotion decisions is sufficient to satisfy the typicality and commonality requirements under Rule 23. *Id.* at 162.

In certifying a class of all blacks presently employed by defendant or who have at any time since October 21, 1979 been employed or sought employment with defendant or who may in the future seek employment by defendant, the Court noted that plaintiff "at this stage" had presented evidence suggesting that Gary Shipp had been responsible for or had at least played a major role in all hiring and promotion decisions during the relevant time period. Accordingly, whether Shipp is prejudiced against blacks and whether this prejudice is reflected uniformly in the Bank's employment practices provided the common question to satisfy the typicality and commonality requirements. The Court noted in its certification order that between October 21, 1979 and June 1982 the class consisted of over one hundred black applicants and fifteen black employees, with subsequent additions to these numbers after June 1982 when the statistics were closed for the purposes of the certification hearing.

If class certification ordered at the initial stage of litigation is later found to have been improvident, the Court may decertify, subclassify or amend the classification when the merits of the case are heard. Fed. R. Civ. P. 23(c); *Valentino v. United States Postal Service*, 674 F.2d 56, 66 (D.C. Cir. 1982); *Eggleston v. Chicago Journeymen Plumbers*, 657 F.2d 890, 896 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982). Upon hearing trial testimony on the scope of Gary Shipp's participation in hiring and promotion decisions, the Court has determined that there is not a common question of law or fact between the unsuccessful black applicants and those blacks employed by the Bank. The evidence showed that although Shipp has final authority over all personnel deci-

sions, his function is largely one of reviewing decisions made by those department supervisors reporting to him. The evidence showed that supervisors make hiring and promotion decisions for their departments, subject to Shipp's approval, and that as a general rule he defers to their judgment. Supervisors also make the initial employee evaluation upon which raises are calculated, subject to approval by the three member Salary Review Committee. Shipp is a member of the committee but does not have a disproportionate impact on the committee's decisions.

Accordingly, after hearing more evidence on the scope of Shipp's participation in the wide range of personnel decisions made by the Bank, the Court finds that Shipp did not make all hiring decisions and all subsequent decisions as to the employees' terms and conditions of employment. Therefore, within the discretion under Rule 23 to alter the class certification, the Court finds that two distinct classes exist: (1) those blacks who have applied to the Bank for employment since October 21, 1979 but were not hired and those blacks applying in the future; and (2) those blacks who have been employed by the Bank since October 21, 1979.

By separating the class into two groups, the Court has created a group of applicants containing more than one hundred persons and a group of employees, which consists of approximately fifteen persons. The Court finds that the class of blacks employed by the defendant since October 21, 1979 does not meet the numerosity requirements of Rule 23. A prerequisite for a class action is that the class is "so numerous that joinder of all members is impracticable." Rule 23(a)(1). No arbitrary number has been established to satisfy the requirement, because the issue is practicability of joinder, not the interested number of persons per se. Practicability of joinder depends on the size of the class, their geographic dispersion, the ease of identifying the members and determining their addresses and the ease of making service

on them if joined. *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980). The Court finds that a class of approximately fifteen persons is not so numerous that joinder would be impracticable, particularly in light of the fact that at least seven persons, in addition to the plaintiff, live in this area because they are currently employed by the Bank.

Further, although plaintiff made allegations of discrimination by defendant in hiring, compensation, initial placement, promotions, terminations, departmental segregation, leave policy and other terms and conditions of employment, there is little or no evidence of discrimination in these categories. No evidence was presented concerning discrimination in leave policy or termination. The evidence showed that in addition to plaintiff, only one black, Sylvia Harden, had applied for promotions which were given to whites. Harden testified at trial that she did not allege that she has been discriminated against on that basis. Three blacks employed by defendant, Harden, Paula Hill and Jacqueline Dancer, testified that they did not claim any discrimination by defendant on the basis of race. Accordingly, because of the small number of black employees and testimony by three of the group that they do not allege discrimination, the Court finds that claims by defendant's black employees are a small and distinct group of individual claims which may not be brought as a class action. There is nothing in the record to show that any black employed by defendant since October 21, 1979 has foregone filing suit against the defendant because of the existence of this action. However, equity requires that no black employee within the relevant time period be barred from filing suit alleging individual claims as a result of reliance on the pending class action. Accordingly, the Court orders that the statute of limitations be tolled from October 21, 1981 to the date of entry of judgment for individual discrimination claims by black employees, upon proof that the employee had actual notice of the filing of the class action

suit and failed to file an individual discrimination claim in reliance on the class claim.

The Court has found that plaintiff's claims are not typical of the claims of the class of unsuccessful black applicants. Accordingly, pursuant to Fed. R. Civ. P. 23, plaintiff is not a proper class representative. Having made such a finding, the Court may now proceed in one of two ways. The Court may appoint a new class representative. *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608 (5th Cir. 1983). In the alternative, the Court may consider the evidence presented at trial relative to discrimination in hiring and determine the merits of the claim. *See General Telephone v. Falcon*, *supra* at 163 (opinion of Chief Justice Burger, concurring in part and dissenting in part).

The Court finds that plaintiff proceeded zealously on behalf of the group of blacks who applied for employment by the Bank, as well as those blacks employed by the Bank and, accordingly, chooses the second course of action. After considering the statistical evidence introduced by plaintiff regarding the hiring of blacks by defendant, the Court finds that they do not present a prima facie case of race discrimination. Blacks represent 13.1% of defendant's non-exempt employees and 11.8% of the population of Tarrant County, 10.2% of the population of the Fort Worth Metropolitan area and 22.8% of the population of Fort Worth. Accordingly, the Court finds that no discrimination against blacks as a class has been proved on the basis of defendant's hiring practices. *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

10. Any conclusion of law which should be a finding of fact is hereby made a finding of fact.

Signed this 20th day of November, 1984.

/s/ Eldon B. Mahon
ELDON B. MAHON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

(Title Omitted in Printing)

JUDGMENT

This action came on for trial before the Court, Honorable Eldon B. Mahon, U.S. District Judge, sitting without a jury. The issues having been duly tried, and the Court having rendered an opinion, it is ORDERED and ADJUDGED that Plaintiff Clara Watson take nothing and that the action be dismissed on the merits. The parties are to bear their own costs of action.

Entered this 20th day of November, 1984.

/s/ Eldon B. Mahon
ELDON B. MAHON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1074

CLARA WATSON,
Plaintiff-Appellant,
v.

FORT WORTH BANK & TRUST,
Defendant-Appellee.

Filed August 27, 1986

Before: Irving L. Goldberg, Carolyn Dineen Randall, and Sam D. Johnson, Circuit Judges.

Opinion by Judge Sam D. Johnson;
Dissent by Judge Irving L. Goldberg

Appeal from the United States District Court
for the Northern District of Texas
Eldon B. Mahon, District Judge, Presiding

OPINION

SAM D. JOHNSON, Circuit Judge:

Plaintiff-appellant Clara Watson appeals from the district court's judgment in favor of defendant-appellee Fort Worth Bank & Trust in Watson's Title VII and Civil Rights action alleging discrimination on the basis of race. 42 U.S.C. § 2000e *et seq*; 42 U.S.C. § 1981. For

the following reasons, this Court affirms the judgment of the district court in part, but vacates the district court's judgment regarding the applicant class claims.

I. *FACTS*

Fort Worth Bank & Trust ("the Bank") hired Watson in August of 1973 as a proof operator. The Bank promoted Watson to the position of teller trainee approximately two years later. After a two to three month training period, Watson became a teller in the Bank's motor bank in January of 1976. Subsequently, the Bank transferred Watson to the Bank's main lobby and later promoted Watson to the position of commercial teller on February 2, 1980.

Over the course of the next year, Watson unsuccessfully applied for four different promotions. First, in February of 1980, Watson unsuccessfully applied for promotion to the position of supervisor of tellers, which became vacant due to the resignation of assistant cashier Brian England. Watson; Richard Burt, a white male who was then the supervisor of the bookkeeping department; Gail Levitt, a white female who was then supervisor of motor bank tellers; and Pat Cullar, a white female who was then a commercial teller, all applied for the position. Gary Shipp, senior vice president and cashier at the Bank since 1977 and the person to whom the supervisor of tellers reported, selected Richard Burt as England's replacement.[1] Second, Watson unsuccessfully applied for promotion to the position of motor bank teller supervisor. Watson, Pat Cullar, and four or five other persons applied for the position vacated by Gail

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[1] The Bank hired Burt in May of 1976 as a part time motor bank teller. At the time, Burt was a full time student. Burt became a full time employee in January of 1977, working first in the general ledger department for one year, then as a credit analyst for six months, and finally as supervisor of the bookkeeping department from 1979 until his promotion to supervisor of tellers. Bu[illegible] obtained a bachelor's degree in banking and finance in May of 1980.

Levitt. Pt Cullar received the promotion.[2] Third, Watson unsuccessfully applied a second time for the position of lobby teller supervisor when the Bank again promoted Burt, Watson, Cullar, Sylvia Hardin, a black female commercial teller, and Patsy Weatherly, a white female who was then supervisor of the proof department, all applied for the position. But chose Cullar. Fourth, as a result of Cullar's second promotion, the position of motor bank teller supervisor again became vacant, and Watson unsucessfully applied for the position. Other applicants included Hardin and Kevin Brown, a white male teller in the motor bank. Based on Cullar's recommendation, Burt selected Brown for the position.[3]

Watson took a leave of absence from work in January 1981 in order to undergo foot surgery. She applied for the last two described promotions while on sick leave. Watson did not return to work after January of 1981, and she subsequently resigned in August of 1981.

II. *PROCEDURAL HISTORY*

After exhausting her administrative remedies, Watson timely filed the instant suit on October 21, 1981, alleging that the Bank discriminated against her and other similarly situated persons on the basis of race in violation of

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[2] Both Watson and Cullar were commercial tellers when the p si-tion of motor bank teller supervisor became vacant. Watson had six and one-half years' experience with the Bank while Cullar had worked for the Bank for only two and one-half years. Cullar, however, had almost eighteen years of experience in banking at another bank, with more than sixteen years of experience in the teller areas. Cullar and Watson scored comparably on the Bank's 104 point job performance evaluation: Watson scored 70 and Cullar scored 72.

[3] The Bank hired Brown as a part time teller in October of 1979. He became a full time teller in May of 1980 and served as Cullar's assistant for six months. His previous experience included seven months as a sales person at a department store and approximately four years' experience at Six Flags Over Texas, which included some work supervising teenage seasonal employees.

42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*[4]

After conducting an evidentiary hearing on the class certification issue, the district court certified a class consisting of "blacks who applied to or were employed by defendant on or after October 21, 1979 or who may submit employment applications to defendant in the future." Subsequently, the district court decertified the broad class of employees and applicants because the district court concluded, in light of all the evidence at trial, that there was not "a common question of law or fact between the unsuccessful black applicants and those blacks employed by the Bank." The district court then split the class into two distinct classes consisting of (1) black applicants and (2) black employees. The district court further found that the class of black employees did not meet the numerosity requirement of Rule 23(a) and decertified the employee class.

On the merits, the district court concluded first that although Watson demonstrated a prima facie case of discrimination, she failed to demonstrate that the Bank's articulated reasons for failing to promote her were pretextual. The district court then addressed the claims of the applicant class holding that Watson's statistical evidence failed to present a prima facie case of discrimination in hiring because the percentage of blacks in the Bank's work force mirrored the percentage of blacks in Tarrant County, Texas, and the Fort Worth metropolitan area, citing *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L. Ed. 2d 768 (1977).

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[4] In this Circuit, specific consideration of an alternate claim under § 1981 is necessary only if its violation is made out on grounds different from those available under Title VII. Watson does not assert such differences, and the elements of a substantive claim of employment discrimination under § 1981 parallel the elements of a Title VII claim. *Page v. U.S. Industries, Inc.*, 726 F.2d 1038, 1041 n.2 (5th Cir. 1984); *see Rivera v. City of Wichita Falls*, 665 F.2d 531, 534 n.4 (5th Cir. 1982).

On appeal, Watson challenges the district court's decertification of the broad class composed of both applicants and employees and further challenges the district court's resolution of both her individual claim and the claims of the applicant class. For the following reasons, this Court affirms the judgment of the district court in part, but vacates the district court's judgment regarding the applicant class claims, remanding solely for the district court to dismiss the applicant class claims without prejudice.

III. *CLASS CERTIFICATION*

A district court's class certification order is reviewed under an abuse of discretion standard. *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986). Even after initial certification, a district court may determine that certification was improvidently granted, and a district court remains free to decertify, subclassify or modify the class certification previously entered. Fed. R. Civ. P. 34(c)(1); *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 2372, 72 L. Ed. 2d 740 (1982).

Prior to the Supreme Court's decision in *Falcon*, this Court permitted a plaintiff alleging race discrimination to assert an "'across the board' attack on all unequal employment practices alleged to have been committed by the employer pursuant to a policy of racial discrimination." 457 U.S. at 152; 102 S.Ct. at 2367. *See e.g., Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969). In *Falcon*, the Supreme Court curtailed that practice holding that it was error for the district court in that case to certify a class of both applicants and employees because the district court erroneously presumed, without a specific presentation, that the requirements of Fed. R. Civ. P. 23 were met. "[W]e reiterate today that a Title VII class action, like any other class action, may only be certified if the trial court

is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." 457 U.S. at 161, 102 S.Ct. at 2372.[5]

Falcon, however, does not foreclose all classes composed of applicants and employees. 457 U.S. at 159 n.15; 102 S.Ct. at 2371 n.15.[6] *See, e.g., Vuyanich v. Republic National Bank*, 723 F.2d 1195, 1199-1200, *rehearing denied*, 736 F.2d 160 (5th Cir.), *cert. denied*, 105 S.Ct. 567 (1984); *Richardson v. Byrd*, 709 F.2d 1016, 1019-20 (5th Cir.), *cert. denied*, 464 U.S. 1009 (1983). The "entirely subjective decisionmaking process" articulated in Footnote 15 presents one factual situation in which a putative class might meet the requirements of Rule

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[5] Federal Rule of Civil Procedure 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Courts commonly refer to these criteria as the requirements of numerosity, commonality, typicality, and adequacy of representation.

In addition, a class action must meet one of the provisions of Rule 23(b). In this case, the district court certified the class as a Rule 23(b)(2) class finding that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]" Fed. R. Civ. P. 23(b)(2).

[6] In Footnote 15, the Supreme Court stated:

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.

23(a). Chief Justice Berger, in his concurring and dissenting opinion, suggests another: Rule 23(a) might be met upon a showing that "the same person or persons who made the challenged decisions were motivated by prejudice against [the protected class], and that this prejudice manifested itself in both the hiring decisions and the decisions not to promote [members of the class]." 457 U.S. at 162 & n., 102 S.Ct. at 2373 & n.

In the instant case, the district court relied on the Chief Justice's opinion to certify a class composed of both applicants and employees. After the evidentiary hearing, the district court found that a single individual, Gary Shipp, was responsible for both hiring and promotion decisions. That fact, the district court reasoned, satisfied the commonality requirement for a class composed of both applicants and employees. After the trial on the merits, however, the district court concluded that Shipp's role was more limited. The evidence at trial demonstrated that a limited group of white department supervisors made all hiring and promotion decisions, as well as employee evaluations used to compute compensation, and that upper management routinely approved those decisions. As a result, the district court concluded that Watson failed to show the existence of common questions between the applicants' and employees' claims because the same *individual* was not responsible for both hiring and promotion decisions.

Watson asserts the district court erred because the commonality requirement may be satisfied by a showing that the same *persons* make both types of decisions. Assuming, *arguendo*, that Watson is correct, this Court's inquiry does not end with that conclusion. We cannot conclude that certification of a class of both employees and applicants is mandated merely because common questions exist.[7] Rather, the other factors enunciated in Rule 23(a) also must be considered.

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[7] The issue in the instant case is not whether it was correct for the district court to initially certify a broad class of both applicants

Thus, assuming a common question was presented in the instant case, *e.g.*, whether the same limited group of white supervisors discriminated in both hiring and promotions, that common question was not in fact a central feature in the actual proof presented at trial. The applicant class claims relied primarily on applicant flow statistics. In contrast, the proof asserted in support of the promotions claims focused on statistical evidence of the Bank's treatment of black individuals in the employee evaluation process, promotions process, compensation process and other employment practices. Consequently, the actual proof presented demonstrates that Watson's promotion claim was not typical of the applicant class claims, and she was not an adequate class representative.[8]

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and employees or whether this Court would have affirmed that certification on appeal. This Court expressly declines to address the question whether a class of applicants and employees would have been permissible under the facts of this case. Rather, the sole question presented is whether the facts of this case *mandate* a class of both applicants and employees. This Court concludes that the facts of the instant case do not mandate such class treatment.

[8] As the Supreme Court noted in *Falcon*, the commonality, typicality, and adequacy of representation requirements of Rule 23(a) tend to merge. All focus on whether a class action is an economical method of adjudicating the claims and whether the plaintiff's claims and class claims are "so interrelated that the interests of the class members will be fairly and adequately protected in their absence." 457 U.S. at 157 & n.13; 102 S.Ct. at 2370 & n.13. In holding that typicality cannot be presumed absent a specific showing identifying common questions of law or fact, the Supreme Court focused on the evidentiary approaches necessary to sustain the individual as compared to the class claims. 457 U.S. at 159, 102 S.Ct. at 2371. *See also Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 334 (4th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984) (although claims of individual and class wide discriminatory termination overlapped on several important pieces of proof with claims of discrimination in promotions, the district court properly denied broad class certification because promotions claims raised significant issues of proof separate from those evidentiary issues implicated by the termination claims).

This Court concludes that it was not an abuse of discretion for the district court to decertify the class because, as a practical matter, the "maintenance of [Watson's] action as a class action did not advance 'the efficiency and economy of litigation which is a principal purpose of the procedure.'"[9] *Falcon*, 457 U.S. at 159, 102 S.Ct. at 2371 (quoting *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553, 94 S.Ct. 756, 766, 38 L. Ed. 2d 713 (1974)). As the actual proof at trial demonstrated, the hiring and promotion claims might well have been tried separately, *id.*, and it was not an abuse of discretion to so proceed.[10]

IV. *WATSON'S INDIVIDUAL CLAIM OF DISCRIMINATION*

The district court analyzed Watson's individual claim of discrimination under the test enunciated in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L. Ed. 2d 207 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973). Under this test, the district court ultimately concluded that Watson was not the victim of racial discrimination.

As an initial matter, Watson asserts that the district court erred in not applying disparate impact analysis to

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[9] Contrary to the assertion of the dissent, this Court does not hold that the actual proof on behalf of the applicant and employee claims must be *identical* in order to maintain a class action composed of both applicant and employee claims. Rather, we hold only that a class action should advance the efficiency and economy of the litigation and the complete failure of the actual proof to overlap to any significant degree leads this Court to conclude that it was not an abuse of discretion to separately try the employee and applicant claims.

[10] Although Watson raises the point only in her reply brief, this Court concludes that the district court did not abuse its discretion in determining that the employee class failed to meet the numerosity requirement of Rule 23(a).

her claims of discrimination in promotion.[11] Contrary to Watson's position on appeal, this Court's recent precedent establishes that a Title VII challenge to an allegedly discretionary promotion system is properly analyzed under the disparate treatment model rather than the disparate impact model. *See, e.g., Lewis v. NLRB*, 750 F.2d 1266, 1271 & n.3 (5th Cir. 1985); *Carroll v. Sears, Roebuck & Company*, 708 F.2d 183, 188 (5th Cir. 1983); *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 620 (5th Cir. 1983); *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795, 800 (5th Cir. 1982).[12] Having de-

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[11] A plaintiff may bring a Title VII action under either the disparate treatment theory or disparate impact theory of recovery. Under the disparate treatment theory, a class must prove the existence of a pattern and practice of discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L. Ed. 2d 396 (1977). A disparate treatment theory requires proof of discriminatory intent, which must be established by either direct or circumstantial evidence. In contrast, the disparate impact theory does not require proof of discriminatory intent. Rather, the plaintiff must show that a facially neutral employment practice has the result of producing a significant adverse impact on one race. *Id.; Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L. Ed. 2d 786 (1977); *Walls v. Mississippi State Department of Public Welfare*, 730 F.2d 306, 315, 321-22 (5th Cir. 1984); *Page*, 726 F.2d at 1045.

[12] *See also Walls*, 730 F.2d at 321-22; *Vuyanich*, 723 F.2d at 1201-02; *Pegues v. Mississippi State Employment Service*, 699 F.2d 760, 765 (5th Cir.), *cert. denied*, 464 U.S. 991 (1983); *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 817 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982).

But see Page, 726 F.2d at 1046 (district court did not err in evaluating subjective promotional system under disparate impact model). Watson relies heavily on *Page* for the proposition that disparate impact analysis is appropriate in the instant case. As stated by this Court in *Carpenter*, "Were this a case of first impression in this court, we would likewise have concluded that the other [challenged practices] . . . fell clearly under the disparate impact model. . . . since they 'limit, segregate, or classify' employees in a manner that 'would deprive or tend to deprive any individual of employment opportunities. . .' because of race. . . ." 706 F.2d at

cided to decertify the class, the district court then properly treated Watson's claim as an individual disparate treatment claim, and the court correctly analyzed this claim under the *Green* model.

Both Watson and the dissent urge that we analyze this case under a different model. Given our approval of the district court's decision to decertify the class, however, this suggestion is unavailing.

This is not to say, however, that the plethora of statistics which Watson introduced at trial, and upon which the dissent so heavily relies, are irrelevant in an individual disparate treatment case. Not only may the statistics be relevant at the initial stage of the litigation in establishing a prima facie case of discrimination,[13] but

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620. Nevertheless, this is not a case of first impression, and this Court is constrained by *Pouncy* and its progeny to apply disparate treatment analysis to Watson's claims.

[13] Other courts have held that an individual Title VII plaintiff may establish a prima facie case of racial discrimination by the use of statistics alone. *See, e.g., Davis v. Califano*, 613 F.2d 957, 962 (D.C. Cir. 1980) ("[S]tatistical evidence may establish a *prima facie* case of employment discrimination in an individual case."); *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 762 (9th Cir. 1980) (following *Davis*); *Christner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1259 & n.7 (6th Cir. 1981) (following *Davis*). *Cf. Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1131 (11th Cir. 1984) ("Statistics can be relevant and important in an individual case . . . . But statistics alone cannot make a case of individual disparate treatment."). We need not decide this issue since Watson established a prima facie case under *Green* without relying exclusively on statistical data. Moreover, statistics are indisputably relevant in an individual Title VII case at the third stage of the litigation: when the plaintiff attempts to establish pretext. *See, e.g., Green*, 411 U.S. at 804-05. Thus, in this case, the statistical data which Watson presented remained pertinent even though the class was eventually decertified. There is no indication in the record, nor is there any suggestion—either by Watson or the dissent—that the district court neglected to consider the statistical evidence presented by Watson in terms of evaluating the credibility of the Bank's proffered explanations for its promotion decisions.

they are also relevant at the third stage of analysis when the plaintiff is attempting to prove that the reasons proffered by the defendant for its action are either unworthy of credence or mere pretexts for discrimination. *See, e.g., Green*, 411 U.S. at 804-05. In this case, the district court did not decide to decertify the class until after the trial had been completed and all the statistical evidence had been introduced. Much of the evidence, of course, was related primarily to the plaintiff's class claims. Even once the class claims dropped from the suit, however, the data retained relevance to the plaintiff's individual claim since it continued to bear on the veracity of the defendant's explanations for its promotion decisions.[14]

After hearing all the evidence, including the statistical evidence, the district court concluded that the reasons offered by the Bank were not pretextual. We judge this holding under the clearly erroneous standard. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). We conclude that the district court's finding that the Bank's explanations for its action were not pretexts for discrimination is not clearly erroneous. The district court's findings will not be set aside unless this Court on the entire evidence is left with the "definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L. Ed. 2d 746 (1948). "Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, — U.S. —, 105 S.Ct. 1504, 1512, — L. Ed 2d — (1985).

Watson challenges the district court's ultimate finding of no discrimination on three specific grounds: (1) that the district court erroneously relied on the Bank's sub-

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[14] We should also point out that, given our instructions *infra* in Part V, the statistical evidence might also be relevant in any class action brought in the future by the class of applicants.

jectively administered performance evaluations, which Watson arrests were proven to be racially biased, (2) that the district court erroneously relied on a reason not articulated by the Bank for its failure to promote her, and (3) that the district court erroneously considered a series of articulated qualifications for promotion which were inconsistent, contradictory, and therefore incredible.

The district court specifically credited the Bank's assertion that it promoted Burt and Cullar rather than Watson because in all three instances Watson had less experience or supervisory experience than the individual chosen for promotion. Although the district court noted that Burt received excellent performance evaluations and that Cullar's and Watson's ratings were comparable, the district court clearly placed primary emphasis on Burt's and Cullar's experience in finding no discrimination and little emphasis on the employee evaluations. This Court cannot say that the district court's ultimate finding was clearly erroneous.

This Court is more troubled by the Bank's promotion of Brown because Brown clearly had less experience than Watson. The district court noted that Cullar highly recommended Brown for the promotion, relying on his performance as a teller and as her assistant. In addition, the Bank relied on Brown's experience supervising temporary employees at Six Flags Over Texas. Finally, the distict court noted that Watson was on sick leave when the position became vacant and Brown, in contrast, was available immediately. The Bank, however, failed to urge this last reason as a basis for its failure to promote Watson. Disregarding this basis for upholding the district court's decision, the record nevertheless still supports "two permissible views of the evidence." Specifically, even though the reasons articulated for Brown's promotion are somewhat inconsistent with the Bank's articulated reasons for Burt's and Cullar's promotions, the district court clearly credited the Bank's explanation. We do not find

any inconsistency to be so striking as to make the Bank's proffered reasons incredible. Consequently, this Court holds that the finding regarding the Brown promotion is not clearly erroneous.

V. *THE APPLICANT CLASS CLAIMS*

After concluding that Watson was not an adequate representative of the applicant class because her promotion claims were not typical of the applicant claims, the district court nevertheless chose to address the merits of the applicant claims. The district court found that Watson failed to present a prima facie case of race discrimination in hiring because the percentage of blacks in the Bank's work force mirrored the percentage of blacks in the population of Tarrant County and the Fort Worth metropolitan area.

Rather than address the correctness of the district court's reliance on population figures rather than applicant flow data, and we note parenthetically our grave concerns with the district court's approach, *see Payne*, 673 F.2d at 823-24, this Court vacates the judgment of the district court as it relates to the applicant class claims. The case is remanded to the district court to dismiss the applicant claims without prejudice. We note the unfair prejudice that might flow from a determination of the class claims when both the district court and this Court have held that the named plaintiff is not a proper class representative. *Vuyanich*, 723 F.2d at 1200; *Wheeler v. City of Columbus*, 703 F.2d 853, 855 (5th Cir. 1982). *See also Goodman v. Lukens Steel Co.*, 777 F.2d 113, 125 (3d Cir. 1986).[15]

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[15] As did the district court, this Court notes that equity requires that no black applicant within the relevant time period be barred from filing suit alleging individual claims or class claims as a result of reliance on the pending class action. Accordingly, the district court may enter any orders on remand it deems necessary to protect the claims of black applicant class members.

VI. *CONCLUSION*

This Court finds no abuse of discretion in the district court's class decertification decision. In addition, this Court affirms the district court's conclusion that Watson was not the victim of racial discrimination. Finally, this Court vacates the district court's judgment as it relates to the applicant class claims and remands the case to the district court to dismiss those applicant class claims without prejudice. The judgment of the district court is

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED.

IRVING L. GOLDBERG, Circuit Judge, dissenting:

Respectfully, but without equivocation, I dissent.

The majority today continues and worsens this circuit's evisceration of the class action's role in the fight against the scourge of race discrimination. The erosion began with *Vuyanich v. Republic National Bank*,[1] and it grows today with the majority's refusal to certify a class of applicants and employees in the face of common and typical questions of fact and law and unrebutted statistical proof of a class-wide pattern and practice of discrimination. Nothing in Rule 23 or this circuit's interpretation of the rule compels this result.

The class action has been the greatest instrument in enforcing Title VII's promise that invidious race discrimination shall have no role in the workplace. Without the efficiency and economy of this procedural tool, it is safe to say that the injuries of thousands would have remained both undiscovered and unredressed.[2] And yet,

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[1] 723 F.2d 1195, *rehearing denied*, 736 F.2d 160 (5th Cir.), *cert. denied*, 105 S.Ct. 567 (1984).

[2] As one commentator has noted

> [T]he foreclosure of broad class actions decreases a person's ability to bring a title VII suit. An individual can bring an action only if he can find an attorney willing to take his case. A plaintiff suing individually or on behalf of a small class may find it difficult to procure a competent attorney. In title VII cases, the size of an attorney's fee award usually corresponds to the number of plaintiffs involved in the suit. As the number of plaintiffs decreases, so too does the attorney's incentive to handle the case. Thus, a person may find it impossible to bring an individual suit or a narrow class action even when he has a meritorious claim.

Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619, 626 (1986). Moreover, because of differences in the scope of discovery and burdens of proof, *see* "Individual Claims" *infra*, "the difference between the success and the failure of a valid claim is often the difference between a class action and an in-

in the name of the very efficiency and economy that give the class action its being, the majority disposes of only one individual's claim and forecloses forever proof of a pattern and practice of discrimination by appellee Ft. Worth Bank & Trust (the bank). The applicants must start over from square one,[3] and the employees have no choice but to shoulder a far more onerous evidentiary burden and prosecute their claims one by one by one. This result serves neither efficiency nor economy. More significantly, it disserves Title VII by preventing the court from recognizing and eradicating what is, on the record before us, clearly a pattern and practice of discrimination. The majority has left the substantive norms of Title VII twisting in the cold wind of the Fifth Circuit's Rule 23.

The majority's opinion has at least two readily apparent consequences. First, the opinion would compel a finding that the district court's initial decision to certify the class was an abuse of discretion. This result is apparent because the nature of plaintiff's statistical proof —which the majority deems fatal to typicality—is the same whether one individual or a group of individuals makes the decisions affecting the class. Thus, even if every single decision had been made exclusively by Shipp instead of the white supervisors, this circuit would now refuse to certify the class because the class representa-

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dividual suit." *Id.* at 628; *see also*, Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 38-39 (1982).

[3] Assuming *arguendo* that the applicants and employees must proceed separately in this case, dismissal of the applicant class is inappropriate. The proper course is a remand to the district court for the appointment of a proper class representative. *Satterwhite v. City of Greenville*, 634 F.2d 231 (5th Cir. 1980) (en banc); *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 619-620 (5th Cir. 1983).

tive, in the absence of a smoking gun, was forced to rely on separate sets of statistics to prove up intent.[4]

Second, and more important, the majority consigns pattern and practice suits to the dustbin of this circuit's history. Whether from inadvertance or fear of overflowing dockets, this circuit is erecting insurmountable obstacles to the full enforcement of Title VII. This dam threatens to stop the flow of statutory rights and holds the promise of an arid and barren future. The rights, duties, and liabilities that arise from the constitution and statutes flow freely and are not to be impeded by the fear that there will be a flood of cases. We have heard this hue and cry since the days of the constitution's nativity, and it has never stopped our judicial instrumentalities from carrying out their duties. It threatens to do so today.

To the matter directly at hand, this appeal raises two significant issues. The first is whether the district court abused its discretion in bifurcating the class. I believe that it did and would accordingly recertify the class. The second issue, which the majority does not reach, is whether the plaintiff successfully established a prima facie case of class-wide disparate treatment. I would answer this question in the affirmative as well, and hold in addition that the bank failed to rebut appellant's case. Accordingly, I would reverse and remand for appropriate relief.

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[4] While the majority in footnote 7 leaves open the possibility that the district court's initial decision to certify the class would not have been an abuse of discretion, this hope is empty. Once an appellate court declares claims atypical as a matter of law, as the majority has done here, a trial court cannot waive the magic wand of judicial discretion to resurrect the claims' typicality. Moreover, even if the trial court could do so, I think it a sad reflection on our system of justice that the vindication of substantive civil rights can in effect hang on an essentially unreviewable exercise of the trial judge's discretion in refusing to certify a class. *Cf. supra* note 2 and *infra* note 9.

Class Certification

Although "racial discrimination is by definition class discrimination," *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 157, 102 S.Ct. 2364, 2370 (1982), Rule 23 of the Federal Rules of Civil Procedure nonetheless restricts the degree to which the courts may deploy this simple fact in structuring class actions. "[T]he allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified." *Id.* Accordingly, "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 2372.

Rule 23(a) imposes upon plaintiffs who seek to represent a class the duty to show that:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

These four elements are commonly referred to as the requirements of numerosity, commonality, typicality, and adequacy of representation.[5]

Prior to the Supreme Court's decision in *Falcon*, the majority rule among the circuits, and in this circuit in

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[5] The district court must also find that the class may proceed under subsection b of Rule 23. In this case, as in most Title VII cases, the district court certified the class under 23(b)(2), which requires a finding that

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

particular, *see Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969), generally permitted "across-the-board" attacks on racially discriminatory employment practices merely upon the showing that the plaintiffs and the class they sought to represent were of the same race. *See generally* Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619, 621 (1986). In *Falcon*, however, this approach ran aground on the shoals of commonality, typicality, and adequacy of representation.[6] As the Supreme Court reasoned,

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Id. at 2730.

In *Falcon*, a Mexican-American who had been denied a promotion sought, as in this case, to represent unsuccessful applicants as well in a broad attack on the defendant's employment practices. The district court certified the across-the-board class. The Supreme Court unanimously reversed holding:

> Without any specific presentation identifying the questions of law or fact that were common to the

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[6] *Falcon* recognized that these three requirements tend to merge, as the first two "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.* at 2370 n.13.

> claims of [the class representative] and of the members of the class he sought to represent, it was error for the District Court to presume that respondent's claim was typical of other claims against petitioner by Mexican-American employees and applicants.

Id at 2371.

The Supreme Court, however, did not foreclose completely the possibility that future plaintiffs might succeed in representing an across-the-board class that did not run afoul of Rule 23's prerequisites. In particular, the Court noted:

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.

Id. at 2371 n.15. While footnote 15 of *Falcon* carves out an exception to what could be considered a general ban against certifying a class of both employees and applicants, it more accurately does no more than simply describe one way in which a putative class representative may satisfy Rule 23's requirement that she demonstrate claims and questions of law or fact typical and common to the class.[7] Footnote 15 does not purport to describe the whole universe of common questions of law and fact

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[7] Chief Justice Burger, concurring and dissenting, wrote separately and suggested that a plaintiff may satisfy Rule 23 if she shows that "those who made the hiring decisions are the same persons who determined who was promoted." *Id.* at 2373. The Chief Justice found that the plaintiff in *Falcon* had not met this burden, because "there is no claim that the same person or persons who made the challenged decisions were motivated by prejudice against Mexican-Americans, and that this prejudice manifested itself in both the hiring decisions and the decisions not to promote respondent." *Id.*

that are sufficient to unite applicants and employees in a common class. It is not a procedural straight-jacket.

Since *Falcon* at least one decision of this circuit has upheld a class of both applicants and employees.[8] In *Richardson v. Byrd*, 709 F.2d 1016 (5th Cir.), *cert. denied*, 104 S.Ct. 527 (1983), the district court had certified a class consisting of both applicants and employees in a sex discrimination case against a Sheriff's employment practices. In holding that the district court had not erred in certifying the class, this court first noted that *Falcon* had not held "that employees never can represent applicants or that an across-the-board class is never appropriate." *Id.* at 1020. The court then found a "sufficient Rule 23(a) nexus'" in the defendant Sheriff's practice of restricting the assignment of all new female deputies to the jail, a practice which, because the number of positions offered females was smaller than that offered males, necessarily limited the number of females that could then be transferred to more desirable positions in the Sheriff's office. The court found "this connection between employees assigned to the jail and job applicants . . . plainly sufficient to support a class of both." *Id.* at 1020. The court then found that the named plaintiff was a proper class representative because "her claim involved issues of law or fact common to those of applicants and employees assigned to the jail." *Id.*

The court based this finding on plaintiff's showing that the

> Sheriff's employment practices were infected by the "entirely subjective decision-making processes" recognized in *Falcon* as a manifestation of policy whose impact might be sufficient to connect otherwise differently situated persons. The district court found that "[t]he Sheriff's Office had no established senior-

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[8] *See also Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 617 (5th Cir. 1983) (statistical proof of channeling in both custodial and clerical positions set forth issues of law or fact sufficient to justify class of both custodial and clerical employees).

> ity or merit system to determine eligibility for transfer o[r] promotion. Nor did it have written guidelines for promotion or transfers. Instead, promotions and transfers were determined by the supervisors, almost all of whom were male, based largely on subjective factors." This finding demonstrates that "discrimination in its broadest sense" was *not* the only claim common to Richardson and the class she sought to represent. Compare *Wheeler v. City of Columbus*, 703 F.2d 853 (5th Cir. 1983). The concerns of *Falcon* were met when the proof surfaced an accused employment *practice* that adversely affected her and the certified class of employees and applicants. *See Carpenter v. Stephen F. Austin State University*, 706 F.2d 608 (5th Cir. 1983) (custodial workers held to be proper class representatives of clerical workers since both were affected by subjective job assignment procedure). The district court did not err in certifying this clases.
>
> *Id.*

Faced with Watson's claim to represent a class of applicants and employees at Ft. Worth Bank & Trust, and mindful of the Supreme Court's recent decision in *Falcon*, the district court properly held a full day's evidentiary hearing on plainitff's request.

The court made the following findings as to the common decision-making process affecting applicants and employees:

> Hiring decisions at the Bank are made by the department supervisors, who then submit their decisions to Gary Shipp for formal approval. Shipp rarely vetoes hiring decisions made by those supervisors reporting to him. Shipp personally interviews some applicants that makes the final hiring decisions only for those persons working directly under his supervision. During all periods relevant to this suit, Shipp had final authority over all personnel matters.

> Performance evaluations and promotion decisions are made by the supervisors for those employees under their authority. Since 1978 employees have been given yearly written evaluations which are completed by their supervisors. Salary increases are calculated on the basis of the performance ratings. The supervisors present the evaluations to the Salary Review Committee, which consists of the president or executive vice president of the Bank, the officer in charge of personnel and the senior operations officer. Occasionally a change in the Supervisor's ratings is made, with the concurrence of the full committee. Gary Shipp has been a member of the Salary Review Committee during the entire period relevant to this case. However, he has no more influence over the employee ratings than do the two other committee members.

Memorandum Opinion, Rec. at 398. Thus, the same exclusively white supervisory staff that makes the hiring decisions also makes essentially all decisions affecting employees within their respective departments. The Salary Review Committee represents the only aberration in this process, in that it rather than Shipp has the final say in salary decisions. However, raises hinge on the score an employee receives from her supervisor's evaluation, and these evaluations are rarely disturbed by the reviewers. In effect then, the supervisors for the most part determine an employee's raise as well as her initial rate of compensation.

In its opinion certifying the class, the district court concluded that Watson had presented "exactly that type of evidence" envisioned by *Falcon's* footnote 15. Rec. at 220. This evidence consisted of appellant's showing that Gary Shipp was "responsible for both the hiring and promotion at defendant bank, and has been for over five years. . . . Although defendant asserts that Mr. Shipp does not make the hiring decisions, it is obvious he does

have 'input' into those decisions, with the potential to 'sway' or otherwise influence their outcome through his discussions with the supervisors. The evidence before the Court shows that Mr. Shipp reports directly to the bank officers and has never advanced a black to a position of supervisors." Rec. at 221. The district court therefore certified a class consisting of all blacks who have been employed by or applied for employment with the Bank since October 21, 1979, or who may apply to the bank in the future. The court found that the class of applicants numbered over one hundred and the class of past and current black employees numbered fifteen as of June 1982.

A district court remains free under Rule 23(c)(1) to reassess and alter its certification order at any time prior to a decision on the merits "if, upon fuller development of the facts, the original determination appears unsound." Advisory Committee Comment; *see also Richardson v. Byrd*, *supra*, 709 F.2d at 1019. The district court exercised this freedom in splitting the class and offered the following reasons:

> Upon hearing trial testimony on the scope of Cary Shipp's participation in hiring and promotion decisions, the Court has determined that there is not a common question of law or fact between the unsuccessful black applicants and those blacks employed by the Bank. The evidence showed that although Shipp has final authority over all personnel decisions, his function is largely one of reviewing decisions made by those department supervisors reporting to him. The evidence showed that supervisors make hiring and promotion decisions for their departments, subject to Shipp's approval, and that as a general rule he defers to their judgment. Supervisors also make the initial employee evaluation upon which raises are calculated, subject to approval by the three member Salary Review Committee. Shipp is a member of the

committee but does not have a disproportionate impact on the committee's decisions.

Accordingly, after hearing more evidence on the scope of Shipp's participation in the wide range of personnel decisions made by the Bank, the Court finds that Shipp did not make all hiring decisions and all subsequent decisions as to the employees' terms and conditions of employment. Therefore, within the discretion under Rule 23 to alter the class certification, the Court finds that two distinct classes exist: (1) those blacks who have applied to the Bank for employment since October 21, 1979, but were not hired and those blacks applying in the future; and (2) those blacks who have been employed by the Bank since October 21, 1979.

Rec. at 404.

We review the district court's certification or decertification of a class only for an abuse of discretion, *Richardson v. Byrd*:

> We recognize that those complex cases cannot be run from the tower of the appellate court given its distinct institutional role and that it has before it printed words rather than people. It follows that class certification decisions must be protected by a level of review that accords substantial discretion.

709 F.2d at 1019.[9] I also heed the bank's warning that it is one thing, given the numerous mandatory pre-

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[9] While class certification decisions are protected by a level of review that accords substantial discretion, it would seem that this level of review should not be applied uniformly to all the elements that guide the district judge's decision. For example, the determinations whether there are questions of law or fact common to the class and whether the claims or defenses of the representative parties are typical should be and are relatively straightforward. On these questions, a level of review that accords substantial dis-

requisites that must be satisfied under Rule 23, to find that a district court abused its discretion in certifying a class, and quite another, given the permissive language of Rule 23(b) ("An action *may* be maintained as a class action . . .") (emphasis added), to hold that a district court abused its discretion in failing to certify a class or, as in this case, in decertifying a class.[10]

To show an abuse of discretion, "plaintiffs on appeal must demonstrate facts in the record below that indicate, among other things, the typicality of their claims and their adequacy as representatives of the excluded members of the putative class." *Crawford v. Western Electric Co., Inc., supra*, 614 F.2d at 1305. When plaintiffs have demonstrated these facts or other common questions and issues, appellate courts have rarely hesitated in ordering the certification or recertification of the class. *See, e.g., Samuel v. University of Pittsburgh*, 538 F.2d 991, 997 (3d Cir. 1976) (recertification); *Marcera v. Chinlund*, 595 F.2d 1231, 1237-40 (2d Cir.) (defendant class and expanded plaintiff class certified), *vacated on other grounds sub nom. Lombard v. Marcera*, 442 U.S. 915, 99 S.Ct. 2833 (1979); *Paxton v. Union National Bank*, 688 F.2d 552, 561 (8th Cir. 1982) (certification),

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cretion is inappropriate, as the appellate court is equally if not more competent than the trial court to make those determinations. On the other hand, the trial court is generally in a better position to determine whether the class is so numerous that joinder of all members is impracticable. The trial court is also generally in a better position to determine whether the representative parties will fairly and adequately protect the interests of the class, insofar as the determination involves an assessment of the competency of counsel and the zeal of the plaintiff.

[10] *But see Crawford v. Western Electric Co., Inc.*, 614 F.2d 1300, 1304 (5th Cir. 1980) ("Since plaintiffs point to no evidence in the pretrial hearing that would *mandate* a finding by the district judge that plaintiffs were adequate representatives of a class that included other types of employees and nonemployees, we perceive no basis on which to find error or an abuse of discretion.") (emphasis added).

cert. denied, 103 S.Ct. 1772 (1983); *Appleyard v. Wallace*, 754 F.2d 955, 957-59 (11th Cir. 1985); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 448-57 (3d Cir. 1977) (antitrust case), *cert. denied*, 98 S.Ct. 1280 (1978).

In this case the district court plainly erred in concluding that there was no question of law or fact common to both the black applicants and employees.[11] It is abundantly clear from both the record and the district court's opinion that the claims of both applicants and employees were united by common questions of fact. First, the same persons generally made the hiring, evaluation, and promotion decisions for their respective departments. As the district court acknowledged, the "evidence showed that supervisors make hiring *and* promotion decisions for their departments, subject to Shipp's approval, and that as a general rule he defers to their judgment." Rec. at 404 (emphasis added). These managerial arrangements are disturbed only when the three member Salary Review Committee intrudes to approve raises. However, the supervisors who make the hiring and promotion decisions also make the initial employee evaluations on which the raises are strictly based, and these evaluations are seldom disturbed. Thus, the fact that Shipp himself

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[11] The trial judge based this conclusion on his finding that "Shipp did not make all hiring decisions and all subsequent decisions as to the employees' terms and conditions of employment." This conclusion in turn undermined his initial decision that "whether Shipp is prejudiced against blacks and whether this prejudice is reflected uniformly in the Bank's employment practices provided the common question to satisfy the typicality and commonality requirements." Rec. at 403. This initial decision, although correct in itself, had in turn been premised upon a misreading of Chief Justice Burger's opinion in *Falcon*. The trial judge read the Chief Justice's opinion to mean that a common question was present only when the same person made both hiring and promotion decisions. The Chief Justice, however, did not limit himself to a single person, but recognized that common questions presented themselves when the "same person *or persons*" made decisions affecting both applicants and employees. *Falcon*, 102 S.Ct. at 2373 (emphasis added).

does not loom as prominently in the formulation and execution of personnel policy as once thought does little to undermine the pressing presence of a common question of fact concerning the role of the all-white supervisory personnel.

The majority, however, would deny certification because "the actual proof presented demonstrates that Watson's promotion claim was not typical of the applicant class claims." This conclusion rests upon the following assertion:

> Thus, assuming a common question was presented in the instant case, *e.g.*, whether the same limited group of white supervisors discriminated in both hiring and promotions, that common question was not a central feature in the actual proof presented at trial. The applicant class claims relied primarily on applicant flow statistics. *In contrast*, the proof asserted in support of the promotions claims focused on statistical evidence of the Bank's treatment of black individuals in the employee evaluation process, promotions process, compensation process and other employment practices. [emphasis added]

This assertion embodies a profound misunderstanding of what the statistical proof represents.

The majority's assertion is equivalent to nothing more than the following: "The applicant class claims relied on statistics relevant to the applicants, and the employee class claims relied on statistics relevant to employees." I fail to see how this can be fatal to typicality.[12] First,

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[12] While the district court's bifurcated findings on the individual and class claims could be cause for some concern, *Falcon*, 102 S.Ct. at 2371, the fact that individual and class findings can be stated separately cannot possibly serve as a blanket excuse for the denial of class certification. If this were so, Watson would have been an improper representative had she simply sought to represent a class of employees denied promotions.

This concern in *Falcon* arose from the class representative's attempt to prosecute a claim of disparate *treatment* on behalf of

there is no relevant "contrast". Both sets of statistics represent the decisions of the same group of white supervisors. The fact that these white supervisors were not raked over the coals or did not have their motives examined explicitly is irrelevant. Statistical proof allows a plaintiff to infer and prove intent in the expected absence of candid admissions of intent to discriminate. That is what statistical proof is all about. Thus, the decisions of these white supervisors were indeed a central feature in the actual proof presented at trial.

Second, proof of disparate treatment against class of employees and applicants would be impossible without both sets of statistics. If an employer discriminates against black applicants, a plausible inference is that he does not suddenly become a Frederick Douglass to his employees. Each set of statistics bolsters the other and makes possible a finding of a pattern and practice of discrimination. There simply does not exist one all-encompassing statistical measure by which plaintiffs can describe the decisions affecting both applicants and employees. The majority's requirement that the proof be identical for both groups is logically impossible and amounts to a requirement that the named plaintiff suffer injuries identical to those of the class members. However,

> Had the Supreme Court in *Falcon* meant to require identical injuries, it would not have offered examples of ways to establish relationships between employment positions. Nor would there remain a need

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himself and a claim of disparate ——— on behalf of the class. These two claims involve substantially different and unrelated elements of proof. Here, however, Watson advances both her individual and class claims under a theory of disparate treatment. Both of these claims require proof of discriminatory intent, and a finding of intent on either claim will benefit the other. This nexus, together with the presence of a substantial common question of fact, is more than adequate to satisfy the requirement of typicality.

> for an analysis of typicality; the representative plaintiff would either be or not be a member of the class. This approach both undermines the congressional intent underlying Title VII and misconstrues the holding of *Falcon*.

4 N. Newberg, Newberg on Class Actions § 24.13 (2d ed. 1985). The district court erred in decertifying the class, and the majority has chosen to enshrine that error as the law of this circuit.

Falcon's footnote 15 provides an additional basis for certifying the class of applicants and employees. First, as will be clear from the impending discussion of the bank's liability,[13] plaintiff presented "significant proof" that the bank operated under a "general policy of discrimination."[14] Second, "the discrimination manifested

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[13] The Supreme Court noted in *East Texas Motor Freight System Inc. v. Rodriguez*, 97 S.Ct. 1891, 1898 n.12, that

> Where no class has been certified, however, and the class claims remain to be tried, the decision whether the named plaintiffs should represent a class is appropriately made on the full record, including the facts developed at the trial of the plaintiffs' individual claims.

A fortiori, when a class has been certified and the class claims already tried, the certification decision may properly take into account all the evidence presented. As one commentator has noted,

> Courts are permitted to look to the merits of a controversy in order to determine if liability theories or their proof are common to the class. Statistics are frequently presented by class plaintiffs to prove a prima facie case of discrimination, giving rise after the fact to questions common to the class.

4 N. Newberg, Newberg on Class Actions § 24.22 (2d ed. 1985).

[14] In *Vuyanich v. Republic National Bank of Dallas*, 723 F.2d 1195 (5th Cir.), *cert. denied*, 105 S.Ct. 567 (1984), the court decertified a class of applicants and employees and distinguished *Richardson v. Byrd*, *supra*, and *Carpenter v. Stephen F. Austin University*, *supra*, by concluding that plaintiffs in *Vuyanich* had not carried their burden of proving a "general policy of discrimination": "The district court's finding that the Bank relied on two

itself in the same general fashion"—first, as already discussed, through the common bond of the supervisors and Shipp; and second, through "an entirely subjective decisionmaking process." As in *Richardson v. Byrd*, there was no established seniority or merit system and no written guidelines to assist in either hiring or promotion decisions. "Instead, promotions and [hires] were determined by the supervisors, . . . all of whom were [white], based largely on subjective factors." *Id.* at 1020.

As to Watson's ability to represent the class adequately, I find it particularly significant that the district court found, with complete support from the record, that "plaintiff proceeded zealously on behalf of the group of blacks who applied for employment by the Bank, as well as those blacks employed by the Bank." Rec. at 407. Moreover, even though the district court split the employees from the applicants, it passed up the option of appointing a new representative [15] and proceeded to reach the merits of the applicant class' claim on the basis of Watson's zealous representation. Thus, on the record before me, I would hold that the district court abused its

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objective inputs—education and experience—in its necessarily subjective hiring process . . . precludes reliance on this 'general policy of discrimination' exception." *Vuyanich* at 1199-1200. In the case at bar, the employees' education and experience were considered in promotion decisions. For the reasons expressed in the dissent from the denial of rehearing en banc in *Vuyanich*, 736 F.2d 160, 162, I would have serious misgivings were I compelled to follow this aspect of *Vuyanich*. The presence of objective factors in a necessarily subjective hiring process does not render that process any less subjective or any less discriminatory.

I rely therefore on *Richardson v. Byrd*, in which the finding of a general policy of discrimination was premised in part on decisionmaking "based *largely* on subjective factors." 709 F.2d at 1010 (emphasis added). *Byrd* was prior in time to *Vuyanich*, and if this circuit wishes to hoist *Vuyanich* to the highest point on the flagpole of Fifth Circuit jurisprudence, it can do so only through an *en banc* opinion of this circuit.

[15] *See supra* note 3.

discretion in finding a lack of questions of law or fact common to the class, and I would direct the court to recertify the plaintiff class. *Accord Samuel v. University of Pittsburgh*, *supra*, 538 F.2d at 997.[16]

Class Claims

The not particulaly voluminous record in this case does not disclose any substantial anecdotal evidence of racial animus. In fact, Ft. Worth Bank & Trust, a not particularly large bank with approximately eight employees in Ft. Worth, Texas, called at trial several of its black employees, who testified that they had never detected any racial discrimination during the course of their employment with the bank.

The numbers, however, belie the bank's claim that it has not discriminated against the class on the basis of race. When Watson began her career at the bank as a proof operator in August 1973, the bank employed four other blacks on its fifty member work force. Two printed checks in the basement, one was a kitchen attendant, and the last was a porter. The bank has never had a black director or officer, nor has it ever had a black supervisor. Watson's unrebutted statistics indicate that a black who applies for a job at the bank has one-fourth the chance of a white applicant to get the job; should the black be hired, her performance is apt to be evaluated thirty points lower and she is apt to be paid $46.00 per month less than an identically qualified white; and the Bank is likely to advance her to greater responsibili-

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[16] Although I have no basis for concluding that the interests of the named plaintiff and other class members would conflict during the relief stage, should they do so, the district court may employ subclasses pursuant to Fed. R. Civ. P. 23(c)(4)(B). "When the class members are united in interest on the liability issues but have potential conflicts regarding the nature of the relief or the division of a monetary award, the court may avoid the potential conflict by creating subclasses." 1 N. Newberg, Newberg on Class Actions § 3.31 (2d ed. 1985).

ties at a rate of six-tenths of a pay grade per year more slowly than the equally qualified white. Watson herself unsuccessfully sought promotion on four occasions to supervisory positions.

A plaintiff may attempt to bring a cause of action under Title VII, 42 U.S.C. § 2000e *et seq.*, on either the disparate treatment or the disparate impact theory of recovery. At the outset, one is faced with appellant's contention that the district court erred in failing to assess her proof under the disparate impact model. Because plaintiff has succeeded in proving class-wide racial discrimination under the disparate treatment theory, I find it unnecessary to decide whether she could have proceeded under a disparate impact model as well.[17]

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[17] In taking this course, I avoid what appears to be a developing intra- and inter-circuit on the reach of disparate impact analysis. In *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982), this court held that "the disparate impact theory applied to an 'overt, clearly identified *nondiscretionary* selection criteri[on] that [was] applied at a single point in a selection process.'" *Id.* at 800 (citations omitted) (emphasis added). Accordingly, the practice of evaluating employees by means of subjective criteria was held not to be "akin to the 'facially neutral employment practices' the disparate impact model was designed to test." *Id.* at 801. *Accord Payne v. Travenol*, 673 F.2d 798, 817 (5th Cir.), *cert. denied*, 103 S.Ct. 451 (1982); *Pegues v. Mississippi State Employment Service*, 699 F.2d 760 (5th Cir. 1982), *cert. denied*, 104 S.Ct. 482 (1983); *Vuyanich v. Republic National Bank of Dallas*, 723 F.2d at 1202.

On the other hand, in language that is difficult to reconcile with *Pouncy*, the court in *Page v. U.S. Industries, Inc.*, 726 F.2d 1038 (5th Cir. 1984), held that the disparate impact model could be properly applied to assess "a promotional system which is based upon subjective selection criteria," because "such a system can be facially neutral but yet be discriminatorily applied so that it impacts adversely on one group." *Id.* at 1046. In *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985), Judge Tuttle wrote that former Fifth Circuit precedent—with which *Pouncy* was found implicitly to be in conflict—"allow[s] disparate impact challenges to the end result of multi-component selection procedures and to subjective selection procedures." *Id.* at 1523. The *Griffin* court also found

The burden of proof in a class-wide disparate treatment case is well established:

> [T]he Title VII plaintiff must prove the existence of a pattern and practice of race discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). To succeed in a disparate treatment case, a plaintiff must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Id.* at 336 & n.16, 97 S.Ct. at 1855 & n.16. He or she must "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Ibid.* In a disparate treatment case discriminatory intent must be established by either direct or circumstantial evidence. *Teamsters, supra*, 431 U.S. at 335 n. 15, 97 S.Ct. at 1854 n. 15; *Wheeler v. City of Columbus, Miss.*, 686 F.2d 1144, 1150 (5th Cir. 1982). . . .
>
> Under the disparate treatment analysis, a Title VII plaintiff may establish a prima facie case of disparate treatment using statistics alone if the statistics show a "gross disparity" in the treatment of

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that the use of disparate impact theory in those circumstances is appropriate in and of itself. *Accord Hawkins v. Bounds*, 752 F.2d 500, 503 (10th Cir. 1985).

This dispute is not insignificant, as it directly affects a plaintiff's burden of proof. In contrast to the plaintiff's burden under the disparate treatment model, plaintiff need not prove discriminatory motive under a disparate impact model, nor does a showing of disparate impact carry with it any implication of discriminatory intent. Thus, while both models assess the "impact" of a defendant's employment practices upon the plaintiff class, this difference in the burden of proof creates a situation in which the threshold at which the impact triggers prima facie liability is significantly less under the disparate impact theory. *Page v. U.S. Industries*, 726 F.2d at 1054 (disparate treatment requires showing of "gross disparity," while a "marked disproportion" suffices to prove disparate impact).

> workers based on discriminatory factors such as race. *Hazelwood School District v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741, 53 L.Ed. 2d 768 (1977); *Carroll v. Sears Roebuck & Co.*, *supra*, 708 F.2d at 190; *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 817 (5th Cir.), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 451, 74 L.Ed.2d 605 (1982). [*See also Pouncy v. Prudential Insurance Co. of America*, *supra*, 668 F.2d at 802 ("When 'the statistical showing is sufficiently strong in a disparate treatment action, [the] plaintiffs' prima facie case can be made without additional evidence establishing that [the] defendant purposefully treated minorities protected under Title VII less favorably than other persons.' ") (citation omitted).] However, if the statistical disparity shown by the plaintiffs' evidence is insufficient alone to establish a prima facie case of disparate treatment, we have held that a Title VII plaintiff "may get over his or her hurdle by combining statistics with historical, individual, or circumstantial evidence." *Payne*, *supra*, 673 F.2d at 817; *Carroll*, *supra*, 708 F.2d at 190. In order to rebut a prima facie case of disparate treatment, the defendant must discredit the plaintiff's evidence or provide a non-discriminatory explanation for the apparently discriminatory result. *Ibid.*

Page v. U.S. Industries, Inc., 726 F.2d 1038, 1045-46 (5th Cir. 1984). "General assertions of good faith or of hiring only the best applicants, however, are insufficient to meet this burden. If the employer fails to rebut the plaintiff's case, the district court may conclude that Title VII has been violated." *Payne v. Travenol Laboratories, Inc.*, *supra*, 673 F.2d at 817.

The Supreme Court has held that a statistical difference between the treatment accorded a class and that accorded other persons reaches the requisite "gross disparity" when the difference between the expected treat-

ment and the actual treatment is greater than two or three standard deviations. *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17, 97 S.Ct. 1272, 1281 n.17 (1977); *Hazlewood School Dist. v. U.S.*, 433 U.S. 299, 311 n.17, 97 S.Ct. 2736, 2743 n.17 (1977). "The 'standard deviation' is a way to calculate the likelihood that chance is responsible for the difference between a predicted result and an actual result . . . . Statisticians tend to discard chance as an explanation for a result when deviations from the expected value approach two standard deviations." *Payne v. Travenol*, 673 F.2d at 821 n.32 (providing formula). Thus, when the standard deviation exceeds two and an explanation from the defendant that something other than race explains the disparity is not forthcoming, the defendant will be held liable.

Plaintiffs may also express statistical disparities in terms other than standard deviations. For example, in this case, plaintiff has used a chi-square test to express her findings in terms of the statistical significance of a disparity. A finding that a disparity is statistically significant "at the 0.05 or 0.01 level" means that there is a five percent or one percent probability, respectively, that the disparity is due to chance. For large samples, the test of two or three standard deviations found by the Supreme Court to constitute sufficient proof "is essentially equivalent to a rule requiring significance at a level in the range below 0.05 or 0.01." *Craik v. Minnesota State University Board*, 731 F.2d 465, 476 n.13 (8th Cir. 1984) (quoting Baldus & Cole, *Statistical Proof of Discrimination* § 9.03, at 297 (1980)); *accord Rivera v. City of Wichita Falls*, 665 F.2d 531, 545 n.22 (5th Cir. 1982); *see also Hazlewood School Dist. v. U.S.*, 433 U.S. 299, 318 n.5 (Stevens, J., dissenting).

With these minimal statistical guides in hand, I turn now to plaintiff's statistical evidence. Before I do, however, one cautionary note, sounded before, is in order:

> The bar is reminded that sound statistical analysis is a task both complex and arduous. Indeed, ob-

> taining sound results by these means, results that can withstand informed testing and sifting both as to method and result, is a mission . . . comparable [in] difficulty to arriving at a correct diagnosis of disease.
>
> We are no more statisticians than we are physicians, and counsel who expect of us informed and consistent treatment of such proofs are well advised to proceed as do those who advance knotty medical problems for resolution. Our innate capacity in such matters extends to "the inexorable zero" and perhaps, unevenly, somewhat beyond; but the day is long past—past at least since the Supreme Court's sophisticated analysis in *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977)—when we proceed with any confidence toward broad conclusions from crude and incomplete statistics. That everyone who has eaten bread has died may tell us something about bread, but not very much.

Wilkins v. University of Houston, 654 F.2d 388, 410 (5th Cir. 1981) (citation omitted), *cert. denied*, 103 S.Ct. 51 (1982).[18] Accordingly, courts rely heavily on the adversary process to illuminate both the strengths and weaknesses of proffered statistical proof. Where a party chooses to leave facially significant proof essentially unrebutted, that party proceeds at her own peril,

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[18] For an example of the perils of mixing uninformed judicial intuition with statistical analysis, see *Pennsylvania v. Rizzo*, 466 F. Supp. 1219, 1229 (E.D. Pa. 1979), in which the district court found that a small sample size defeated plaintiffs' showing of statistical significance. As pointed out in Baldus & Cole, *supra* § 9.1 (1985 Supp.), however, plaintiff's proof of statistical significance had already taken into account the sample size. "The court, in effect, double counted the influence of the small sample." *Id.* (other cases cited).

for a court will not presume to shoulder her burden of rebuttal.[19]

Working from a stipulated data base, appellant first presented evidence regarding discrimination in hiring. Of 533 white and 144 black applicants during a period of over four years. 16.7% of the whites and 4.2% of the blacks received offers of employment.[20] Plaintiff's expert testified that the disparity was significant at 0.0001, meaning that the probability that this result was due to chance was one in ten thousand. Rec. at 119. My own calculations show that the difference between the actual number of black offers and the expected value is greater than three standard deviations. This pattern repeated itself to a somewhat lesser extent in appellant's analysis of offers to those applicants who specifically requested a

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[19] Except in the area of salary, *see infra* note 30, defendant presented the skimpiest of rebuttal evidence. As witnesses, the bank called four white officers and three black employees, none of whom had any special statistical expertise and who could only testify to, in the case of the whites, the bank's good faith, and, in the case of the blacks, the absence of any noticeable discriminatory climate. None of the black witnesses, however, had any knowledge of the statistical disparities. At best, these witnesses rebut any anecdotal evidence. Where the plaintiff is relying on statistical evidence, however, these witnesses are about as useful as a football in a game of basketball. Moreover, as will be explained in the text, the attempts by defendant's counsel to undermine the statistics on cross-examination are unavailing.

[20] The data are described in the following chart:

OFFERS OF EMPLOYMENT, BY RACE

	WHITES	BLACKS
OFFER	16.7% (89)	4.2% (6)
NO OFFER	83.3% (444)	95.8% (138)
TOTAL	100.0% (533)	100.0% (144)

Plaintiff's Exhibit (hereafter "P-x") 10.

teller position [21] (significant at 0.01) or a clerical position [22] (significant at 0.05). In addition, appellant tested to see whether certain cycles in the bank's hiring period, during which the bank's hiring needs fluctuated, could account for the observed disparity. Appellant looked for the possibility that blacks tended to apply in greater numbers when the bank's hiring needs were less. However, the data indicate that blacks and whites did not apply at significantly different times vis-a-vis the bank's hiring cycle.[23]

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[21] OFFERS TO TELLER APPLICANTS, BY RACE

	WHITES	BLACKS
OFFER	20.1% (32)	5.3% (6)
NO OFFER	79.9% (127)	94.7% (54)
TOTAL	100.0% (159)	100.0% (57)

P-x 13.

[22] OFFERS TO CLERICAL APPLICANTS, BY RACE

	WHITES	BLACKS
OFFER	15.2% (30)	4.8% (3)
NO OFFER	84.8% (168)	95.2% (60)
TOTAL	100.0% (198)	100.0% (63)

P-x 17.

[23] The data are summarized in the following table and cover nine six-month periods:

APPLICANTS, BY RACE, IN DIFFERENT HIRING PERIODS

	WHITES	BLACKS
PERIODS DURING WHICH LESS THAN 10% OF APPLICANTS HIRED	48.6% (259)	52.8% (76)
PERIODS IN WHICH MORE THAN 10% OF APPLICANTS HIRED	51.4% (274)	47.2% (68)
TOTAL	100.0% (533)	100.0% (144)

The chi-square probabilit yis 0.37.

P-x 22.

The district court, for reasons unarticulated in its opinion, completely ignored these data. Instead, it held as follows:

> After considering the statistical evidence introduced by plaintiffs regarding the hiring of blacks by defendant, the Court finds that they do not present a prima facie case of race discrimination. Blacks represent 13.1% of defendant's non-exempt employees and 11.8% of the population of Tarrant County, 10.2% of the population of the Fort Worth Metropolitan area and 22.8% of the population of Fort Worth. Accordingly, the Court finds that no discrimination against blacks as a class has been proved on the basis of defendant's hiring practices.

Rec. at 407.

As a finding of fact, the district court's ultimate finding on the existence of discrimination may not be overturned unless clearly erroneous. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 1788 (1982). A finding of fact is clearly erroneous if the reviewing court is left with "the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

I believe it unnecessary to decide whether the conclusion drawn by the district court from the population data is clearly erroneous, because I would agree with appellant that the district court erred as a matter of law in working from the population figures rather than the applicant flow data. Defendant argues correctly that population figures are preferable when the applicant flow data is shown to be significantly flawed. *Payne v. Travenol*, 673 F.2d at 823. However, absent significant flaws in the applicant flow data, these data are far more relevant than general population data to an analysis of an employer's hiring practices. *Id.* at 823-24; *see also Hazelwood*, 97 S.Ct. at 2742 n.13 (applicant flow data "very relevant").

The bank's only attack on the applicant flow data is a claim that the data fail to take into account either the applicants' qualifications or the possibility that duplicative applications skew the data base. Assuming *arguendo* that the bank's non-exempt positions do require minimal qualifications—a point on which the defendant offered no evidence [24]—the bank nonetheless suggested no reason to assume that these qualifications were unevenly distributed between blacks and whites. Absent proof to the contrary, courts should decline to assume that blacks and whites do not possess the relevant qualifications in equal proportions. *Payne v. Travenol*, 673 F.2d at 822; *De Medina v. Reinhardt*, 686 F.2d 997, 1008 (D.C. Cir. 1982). The same argument applies with equal force to the bank's contention regarding duplicate submissions.[25]

In the clear and unshaded light of appellant's statistical evidence, I would conclude that the district court's conclusion that appellant failed to make out a prima facie case of discrimination in hiring is clearly erroneous. Because the bank wholly failed to rebut appellant's proof, I conclude that the bank has discriminated against the class on the basis of race in its hiring.

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[24] At one point in his testimony, Shipp asserted that, based on his recollection of the applicant flow, "basically whites do generally have more previous experience" than blacks. Rec. Vol. V. at 43. However, he had not preserved the data on which this recollection was based and I would therefore find it unworthy of credence; it amounts to little more than an unacceptable "[g]eneral assertion[] of good faith or of hiring only the best applicants." *Payne v. Travenol, supra*, 673 F.2d at 817.

[25] The bank also submitted its own analysis of the applicant flow data which was restricted to applications received within fourteen days of thirty-five hires. This analysis showed that since October 21, 1979, 63 blacks and 108 nonblacks had applied for the 35 positions, and that 8% of the blacks and 28% of the non-blacks were hired. As appellant's expert showed, however, these data still cut in appellant's favor, as the disparity was statistically significant at 0.01. Defendant's Exhibit 2; Rec. Vol. V at 132-33.

I would conclude as well that the bank has discriminated on the basis of race against the employee members of the class. By far the most compelling evidence on this point—and one that also went unrebutted—concerns the disparate treatment accorded the class in the evaluation process.[26] Over a period covering four annual evaluations, blacks rated an average of eleven to fifteen points lower than their non-black co-workers. These differences are statistically significant from 0.05 to 0.001.[27] In order

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[26] Each supervisor rates the employees under his or her supervision in twelve categories on a scale from zero to seven, eight, or ten. The categories are: (1) Accuracy of work; (2) Alertness; (3) Personal Appearance; (4) Supervisor-worker relations; (5) Quantity of Work; (6) Physical Fitness; (7) Attendance; (8) Dependability; (9) Stability ("The ability to withstand pressure and remain calm in most situations"); (10) Drive ("Ambition"); (11) Friendliness and Courtesy; and (12) Job Knowledge. Plaintiff's Exhibit 4.

Few of these categories have much objective content. For example, "personal appearance," "drive," and "friendliness and courtesy" are clearly subjective on their face. While "Quantity of Work" could lend itself to objective measurement, the rating system itself is also subjective: 0-1, "does not meet minimum requirement"; 2-3, "does just enough to get by"; 4, "volume of work is satisfactory"; 5-6, "very industrious does more than is required"; 7-8, "superior work production record." This type of subjective measurement lends itself to discriminatory bias, be it conscious or unconscious.

[27] The data are set out in the following table:

MEAN EVALUATIONS, BY RACE, DURING PERIOD OF CLASS

	NON-BLACKS	BLACKS
FIRST EVALUATION	78.0	***63.0
SECOND EVALUATION	82.8	**69.2
THIRD EVALUATION	84.6	**73.9
FOURTH EVALUATION	85.9	*74.7

* —Statistically significant at .05

** —Statistically significant at .01

*** —Statistically significant at .001

P-x 26.

to see whether factors other than race accounted for these disparities, appellant presented a multiple regression analysis of the data, controlling for the employees' prior experience and initial grade placement at the time of hire. This analysis showed a coefficient for race of —34.37 on the first evaluation and —39.31 on the second evaluation, which means that, after controlling for the effects of experience and grade at hire, blacks scored 34.37 and 39.91 points below non-blacks on the first and second evaluations, respectively, during the period of the class. Both coefficients are significant at 0.001.[28]

Appellant also analyzed the bank's promotions and compensation practices as they affected non-exempt employees. Blacks averaged consistently less across the board.[29] Because the presentation of raw averages alone

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[28] In tabular form, the results are as follows:

STATISTICAL REGRESSIONS FOR EMPLOYEE EVALUATIONS, BY RACE

DEPENDENT VARIABLE	CONTROLLED VARIABLES	COEFFICIENT FOR RACE
FIRST EVALUATION	(A) EXPERIENCE AT HIRE	—34.37
	(B) GRADE AT HIRE	
SECOND EVALUATION	(A) AND (B)	—39.91

P-x 28.

[29] The data are summarized in the following table:

PROMOTIONS AND COMPENSATION, BY RACE

	NON-BLACKS	BLACKS
AVERAGE ANNUAL INCREACE IN GRADE	.53	.18
AVERAGE ANNUAL INCREASE IN SALARY	14.9%	12.0%
AVERAGE FINAL GRADE	5.29	4.13
AVERAGE FINAL SALARY/MONTH	$917.15	$861.47

P-x 29.

is generally not considered probative of disparate treatment, *see Pouncy v. Prudential Insurance Co. of America*, *supra*, 668 F.2d at 802-03, appellant conducted another multiple regression analysis to control for various factors—listed in note 29 below—that might have affected the averages. This analysis again reflected significant disparate treatment of blacks, revealing a disparity in salary of $45.98 per month.[30] This latter figure was statistically significant at .05, which appellant's expert characterized as "compelling" and "actually kind of remarkable, given how much went into that equation and

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[30] These analyses are summarized in the following table:

PROMOTION AND COMPENSATION REGRESSIONS

DEPENDENT VARIABLE	CONTROLLED VARIABLES	COEFFICIENT FOR RACE
AVERAGE ANNUAL INCREASE IN GRADE	(A) EDUCATION (B) FIRST GRADE DURING CLASS PERIOD	—.6***
FINAL GRADE	EDUCATION	—1.22***
FINAL GRADE	EXPERIENCE AT FINAL DATE	—1.21***
FINAL GRADE	(A) EDUCATION (B) EXPERIENCE AT FINAL DATE (C) FIRST EVALUATION	—1.38***
FINAL SALARY	(A) EDUCATION (B) EXPERIENCE AT FINAL DATE (C) FIRST EVALUATION (D) SECOND EVALUATION (E) MIDPOINT OF SALARY RANGE PER FINAL GRADE	—$45.98*

* —Statistically significant at .05.

*** —Statistically significant at .001.

P-x 30.

the quantity of the number of black employees." Rec. Vol. V at 174.[21]

Appellant's expert summarized his findings as follows:

> [There] are race-related differences, most of them significant in all of those variables, both in the hir-

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[21] During the certification hearing, appellee offered a statistical expert who presented a model, developed through a multiple regression analysis, of employee salaries. Using current white salaries as the dependent variable, the statistician first developed a model that would predict the salaries of whites given the following variables: the employee's tenure, job grade, and date of departure. The data were then plotted on a graph, with actual salary on the x-axis and "residual"—the difference between the actual salary and the predicted salary—on the y-axis. The residual values ranged from −180 (indicating an actual salary $180 less than the predicted salary) through zero (where actual salary equals predicted salary) to +180. Horizonal lines were drawn at zero—to represent the expected value—and −150 and +150—to represent two standard deviations. The plotted data fell randomly on either side of the zero line and generally within the lines representing two standard deviations. The distribution indicated that the graph accurately predicted white salaries.

The next step in the analysis was to see whether the white model would predict black salaries to a statistically significant degree. The data points all fell within two standard deviations of the expected value. From this, the appellee's expert concluded that the graph described a situation where race was not a factor. Rec. Vol. III at 232.

I would not consider this evidence sufficient to rebut appellant's showing for the following reason: All but two of the eleven data points for blacks fall below the expected value. In fact, the average residual value for blacks is −37.64, while the average for whites is, by definition, zero. Thus, appellee's own model shows that blacks received on average $37.64 per month less than whites, which tends to corroborate rather than rebut appellant's finding that blacks received $45.98 less than whites. While each individual data point might fall within two standard deviations of the expected value, this result fails to rebut appellant's evidence because the data points are skewed towards the low end of the scale. In fact, appellee's expert's only comment on this distribution was a less than ringing endorsement: "Well, the data is not clearly normal, but, then, again, it is not clearly non-normal." *Id.*

> ing part and in the treatment of present employees. . . . You get a consistent pattern of race-related differences, depending on how many people you have and what the—the number of characteristics you are talking about. Sometimes it is stronger than others, but it is very, very consistent in one particular direction . . . . *And, frankly, I think that that consistency is about equal or more important than any single figure or the significance levels.*

Rec. Vol. V at 175-176 (emphasis added).

On the basis of appellant's statistical evidence, and because of appellee's failure to rebut that evidence either by a direct attack on the statistics or by other means, I conclude that appellant has proved the existence of a pattern and practice of racial discrimination in the employment practices of appellee Ft. Worth Bank & Trust.

Individual Claims

In light of a finding of class-wide disparate treatment, I would hold that the district court erred in considering appellant's individual claim in the evidentiary framework of *McDonnell Douglas Corp. v. Green*, 422 U.S. 792, 93 S.Ct. 1817 (1973) and its progeny.[32] When an individual proves discrimination against a certified class of which she is a member, her individual claim proceeds in a different posture.

> The establishment of liability on the class claim operates to establish a prima facie case on behalf of each member of the class. Once the individual plaintiff proves that he applied unsuccessfully, the burden shifts to the employer to establish that its failure to hire that individual was the result of legitimate nondiscriminatory reasons.

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[32] *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981).

Phillips v. Joint Legislative Committee, Etc., 637 F.2d 1014, 1031 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 2035 (1982). *See also Payne v. Travenol*, 673 F.2d at 818; *Craik v. Minnesota State University Board*, *supra*, 731 F.2d at 469-71.

A defendant against whom a finding of class-wide discrimination has been entered finds itself in the position of a "proved wrongdoer," and therefore no longer enjoys the presumption that its decisions were free of discriminatory intent. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 1867 n.45 (1977). In fact, the presumption is that all the defendant's decisions were tainted by discriminatory intent. *Id.* at 1868. Thus, it is not sufficient, as it was in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 2950 (1978), that the employer merely "articulate some legitimate, nondiscriminatory reason for the employee's rejection," nor may the defendant escape, as in *Burdine*, 101 S. Ct. at 1094, without "persuad[ing] the court that it was actually motivated by the proffered reasons." On the contrary, the employer "has the burden of *proving* that the individual claimant was denied an employment opportunity for legitimate reasons." *Richardson v. Byrd*, *supra*, 709 F.2d at 1021. *See also*, *Phillips v. Joint Legislative Committee*, *supra* (employer must affirmatively establish that its decision "*was the result of* legitimate reasons") (emphasis added); *Craik v. Minnesota State University Board*, *supra*, 731 F.2d at 470 ("In pattern or practice cases, however, the presumption shifts to the employer not only the burden of production, but also the burden of persuading the trier of fact that it is more likely than not the employer did not unlawfully discriminate against the individual.") (footnote omitted). I would remand appellant's individual claim so that it may be considered in this framework.

Conclusion

This case should have been a reminder that discrimination need not manifest itself through the spoken word in order to exist. While the absence of the "smoking gun" might now be rare, *but see, e.g., Sylvester v. Callon Energy Services, Inc.*, 781 F.2d 520, 521 (5th Cir. 1986) (employer "wasn't sleeping with no nigger"), Title VII allows plaintiffs to seek redress from discrimination that operates covertly as well as overtly. While still waters run deep, this case should have shown that they are not necessarily pure.

Instead, the majority has shown that this circuit has learned the lesson of *Falcon* too well. Although *Falcon* is not a funeral pyre for broad class actions, the majority has chosen to place yet another stumbling block in the path of those who have long been denied justice. I have no doubt that the majority's opinion will be used, as it has been here, repeatedly to strike down and discourage legitimate claims. The clock may be turning back, but let us at least stay its hands a little longer to forestall the bleakness that seems apparent on the horizon.

The district court erred in failing to find racially disparate treatment against the proper class of applicants and employees, and I would accordingly reverse and remand for appropriate relief.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Title Omitted in Printing)

Appeal from the United States District Court
for the Northern District of Texas

Before GOLDBERG, RANDALL, and JOHNSON,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part and vacated in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that costs on appeal be taxed equally against the parties, said costs to be taxed by the Clerk of this Court.

August 27, 1986

GOLDBERG, Circuit Judge, dissenting.

ISSUED AS MANDATE: Oct. 10, 1986.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Title Omitted in Printing)

Appeal from the United States District Court
for the Northern District of Texas

ON SUGGESTION FOR REHEARING *EN BANC*

(Opinion 8/27/86, 5 Cir., 198-, —— F.2d ——)
(September 30, 1986)

Before GOLDBERG, RANDALL, and JOHNSON,
Circuit Judges

PER CURIAM:

(x) Treating the suggesting for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam Johnson
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA4-81-581-E

CLARA WATSON

vs.

FORT WORTH BANK & TRUST

PLAINTIFF'S EXHIBIT 9

RATE OF HIRE BY RACE

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
HIRED	14.8%	(79)	3.5%	(5)
REJECTED	85.2%	(454)	96.5%	(139)
TOTAL	100.0%	(533)	100.0%	(144)

NOTE: Chi-Square significant at .0001.

PLAINTIFF'S EXHIBIT 10

OFFERS OF EMPLOYMENT BY RACE

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	16.7%	(89)	4.2%	(6)
NO OFFER	83.3%	(444)	95.8%	(138)
TOTAL	100.0%	(533)	100.0%	(144)

NOTE: Chi-Square significant at .0001.

PLAINTIFF'S EXHIBIT 11

OFFERS TO SECRETARIAL APPLICANTS, BY RACE

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	26.4%	(14)	0%	(0)
NO OFFER	73.6%	(39)	100.0%	(1)
TOTAL	100.0%	(53)	100.0%	(1)

NOTE: This table reports the Bank's decisions on all applicants specifically requesting a secretarial position.

PLAINTIFF'S EXHIBIT 12

OFFERS TO SECRETARIAL APPLICANTS, BY RACE:
LARGER POOL
SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	14.1%	(25)	0%	(0)
NO OFFER	85.9%	(152)	100.0%	(21)
TOTAL	100.0%	(177)	100.0%	(21)

NOTE: This table reports the Bank's decisions on all applicants who either specifically requested a secretarial position or left open the position for which they wished to be considered.

PLAINTIFF'S EXHIBIT 13

OFFERS TO TELLER APPLICANTS, BY RACE

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	20.1%	(32)	5.3%	(3)
NO OFFER	79.9%	(127)	94.7%	(54)
TOTAL	100.0%	(159)	100.0%	(57)

NOTE: Chi-Square significant at .01. This table reports the Bank's decisions on all applicants who specifically requested a teller position.

PLAINTIFF'S EXHIBIT 14

TELLERS HIRED FROM TELLER APPLICANTS, BY RACE

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
HIRED AS TELLER	18.2%	(29)	5.3%	(3)
NOT HIRED AS TELLER	81.8%	(130)	94.7%	(54)
TOTAL	100.0%	(159)	100.0%	(57)

NOTE: Chi-Square significant at .02. This table reports the Bank's teller decisions on all applicants who specifically requested a teller position.

PLAINTIFF'S EXHIBIT 15

OFFERS TO TELLER APPLICANTS, BY RACE:
LARGER POOL
SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFERS	14.8%	(44)	3.5%	(3)
NO OFFERS	85.2%	(253)	96.5%	(82)
TOTAL	100.0%	(297)	100.0%	(85)

NOTE: Chi-Square significant at .01. This table reports the Bank's decisions on all applicants who either specifically requested a teller position or left open the position for which they wished to be considered.

PLAINTIFF'S EXHIBIT 16

TELLERS HIRED FROM TELLER APPLICANTS, BY RACE:

LARGER POOL

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
HIRED AS TELLER	10.1%	(30)	3.5%	(3)
NOT HIRED AS TELLER	89.9%	(267)	96.5%	(82)
TOTAL	100.0%	(297)	100.0%	(85)

NOTE: This table reports the Bank's teller decisions on all applicants who either specifically requested a teller position or left open the position for which they wished to be considered.

PLAINTIFF'S EXHIBIT 17

OFFERS TO CLERICAL APPLICANTS, BY RACE

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	15.2%	(30)	4.8%	(3)
NO OFFER	84.8%	(168)	95.2%	(60)
TOTAL	100.0%	(198)	100.0%	(63)

NOTE: Chi-Square significant at .05. This table reports the Bank's decisions on all applicants who specifically requested a clerical position other than secretary or teller.

PLAINTIFF'S EXHIBIT 18

OFFERS TO CLERICAL APPLICANTS, BY RACE:
LARGER POOL
SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	13.3%	(42)	3.6%	(3)
NO OFFER	86.7%	(273)	96.4%	(80)
TOTAL	100.0%	(315)	100.0%	(83)

NOTE: Chi-Square significant at .01. This table reports the Bank's decisions on all applicants who either specifically requested a clerical position other than secretary or teller or left open the position for which they wished to be considered.

PLAINTIFF'S EXHIBIT 19

CLERKS HIRED FROM CLERICAL APPLICANTS, BY RACE:

LARGER POOL

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
HIRED AS CLERK	11.4%	(36)	2.4%	(2)
NOT HIRED AS CLERK	88.6%	(279)	97.6%	(81)
TOTAL	100.0%	(315)	100.0%	(83)

NOTE: This table reports the Bank's clerical decisions on all applicants who either specifically requested a clerical position other than secretary or teller or left open the position for which they wished to be considered.

PLAINTIFF'S EXHIBIT 20

OFFERS TO NON-PROFESSIONAL APPLICANTS, BY RACE

SUMMARY OF EXHIBIT 6

	WHITES	BLACKS
OFFER	22.2% (2)	0% (0)
NO OFFER	77.8% (7)	100.0% (5)
TOTAL	100.0% (9)	100.0% (5)

NOTE: This table reports the Bank's decisions on all applicants who specifically requested a non-professional position.

PLAINTIFF'S EXHIBIT 21

OFFERS TO NON-PROFESSIONAL APPLICANTS, BY RACE:

LARGER POOL

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	10.8%	(14)	0%	(0)
NO OFFER	89.2%	(116)	100.0%	(24)
TOTAL	100.0%	(130)	100.0%	(24)

NOTE: This table reports the Bank's decisions on all applicants who either specifically requested a non-professional position or left open the position for which they wished to be considered.

PLAINTIFF'S EXHIBIT 22

APPLICANTS BY RACE,
IN DIFFERENT HIRING PERIODS

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
PERIODS DURING WHICH LESS THAN 10% OF APPLICANTS HIRED	48.6%	(259)	52.8%	(76)
PERIODS IN WHICH MORE THAN 10% OF APPLICANTS HIRED	51.4%	(274)	47.2%	(68)
TOTAL	100.0%	(533)	100.0%	(144)

NOTE: Chi-Square probability equals .37. This table reports whether each applicant sought a bank position during a period when the Bank hired less than 10% of its applicants or during a period when the Bank hired more than 10% of its applicants.

PLAINTIFF'S EXHIBIT 23A

OFFERS TO PERSONS, BY RACE, WHO APPLIED DURING PERIODS WHEN BANK HIRED LESS THAN TEN PERCENT (10%) OF APPLICANTS

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	11.2%	(29)	3.9%	(3)
NO OFFER	88.8%	(230)	96.1%	(73)
TOTAL	100.0%	(259)	100.0%	(76)

NOTE: Chi-Square significant at .05.

PLAINTIFF'S EXHIBIT 23B

OFFERS TO PERSONS, BY RACE, WHO APPLIED DURING PERIODS WHEN BANK HIRED OVER TEN PERCENT (10%) OF APPLICANTS

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	21.9%	(60)	4.4%	(3)
NO OFFER	78.1%	(214)	95.6%	(65)
TOTAL	100.0%	(274)	100.0%	(68)

NOTE: Chi-Square significant at .001.

PLAINTIFF'S EXHIBIT 24

DEPARTMENTAL SEGREGATION, BY RACE

SUMMARY OF DEFENDANT'S PERSONNEL HISTORIES

	NON-BLACK PERSON-MONTHS		BLACK PERSON-MONTHS	
NON-OPERATIONS DEPARTMENTS	15.0%	(403)	0%	(0)
OPERATIONS DEPARTMENTS	85.0%	(2224)	100.0%	(444.5)
TOTAL	100.0%	(2627)	100.0%	(444.5)

NOTE: Chi-Square significant at .001.

PLAINTIFF'S EXHIBIT 25

DEPARTMENTAL SEGREGATION, BY RACE:

EXPANDED TABLE

SUMMARY OF DEFENDANT'S PERSONNEL HISTORIES

	NON-BLACK PERSON-MONTHS		BLACK PERSON-MONTHS	
NON-OPERATIONS DEPARTMENTS	100.%	(403)	0%	(0)
PUBLIC OPERATIONS DEPARTMENTS	85 %	(2004.75)	15%	(356.5)
NON-PUBLIC OPERATIONS DEPARTMENTS	71 %	(219.25)	29%	(88)
TOTAL	86 %	(2627)	14%	(444.5)

NOTE: Chi-Square significant at .001.

PLAINTIFF'S EXHIBIT 26

MEAN EVALUATIONS, BY RACE, DURING PERIOD OF CLASS

SUMMARY OF EXHIBIT 8

	NON-BLACKS	BLACKS
FIRST EVALUATION	78.0	*** 63.0
SECOND EVALUATION	82.8	** 69.2
THIRD EVALUATION	84.6	** 73.9
FOURTH EVALUATION	85.9	* 74.7

*—Statistically significant at .05.
**—Statistically significant at .01.
***—Statistically significant at .001.

PLAINTIFF'S EXHIBIT 27

INTERCORRELATION OF EMPLOYEE EVALUATIONS

SUMMARY OF EXHIBIT 8

	1st Evaluation	2nd Evaluation	3rd Evaluation	4th Evaluation
1st Evaluation		.74	.70	.71
2nd Evaluation			.69	.57
3rd Evaluation				.71
4th Evaluation				

NOTE: This table reports the Pearson product-moment correlation coefficient for each pair of evaluations. All coefficients are significant at .001.

PLAINTIFF'S EXHIBIT 28

STATISTICAL REGRESSIONS FOR EMPLOYEE EVALUATIONS, BY RACE

SUMMARY OF EXHIBIT 8

Dependent Variable	Controlled Variables	Coefficient of Race
First Evaluation	(A) Experience At Hire (B) Grade At Hire	−34.37
Second Evaluation	(A) And (B)	−39.91

NOTE: This table reports that, after controlling for the effects of experience and grade at hire, blacks scored 34.37 points below non-blacks on their first evaluation during the period of the class. The coefficient of −39.91 has an equivalent interpretation. Both coefficients are significant at .001.

PLAINTIFF'S EXHIBIT 29

PROMOTIONS AND COMPENSATION, BY RACE

SUMMARY OF EXHIBIT 8

	NON-BLACKS	BLACKS
AVERAGE ANNUAL INCREASE IN GRADE	.53	.18
AVERAGE ANNUAL INCREASE IN SALARY	14.9 %	12.0 %
AVERAGE FINAL GRADE	5.29	4.13
AVERAGE FINAL SALARY	$917.15	$861.47

PLAINTIFF'S EXHIBIT 30

PROMOTION AND COMPENSATION REGRESSIONS

SUMMARY OF EXHIBIT 8

DEPENDENT VARIABLE	CONTROLLED VARIABLES	COEFFICIENT FOR RACE
AVERAGE ANNUAL INCREASE IN GRADE	(A) EDUCATION (B) FIRST GRADE DURING CLASS PERIOD	— .6 ***
FINAL GRADE	EDUCATION	—1.22***
FINAL GRADE	EXPERIENCE AT FINAL DATE	—1.21***
FINAL GRADE	(A) EDUCATION (B) EXPERIENCE AT FINAL DATE (C) FIRST EVALUATION	—1.38***
FINAL SALARY	(A) EDUCATION (B) EXPERIENCE AT FINAL DATE (C) FIRST EVALUATION (D) SECOND EVALUATION (E) MIDPOINT OF SALARY RANGE PER FINAL GRADE	—$45.98*

NOTE: The coefficients for race should be interpreted precisely as were the coffiicents for race of Exhiibt 28.

*—Statistically significant at .05.

***—Statistically significant at .001.

PLAINTIFF'S EXHIBIT 31

RATE OF INVOLUNTARY TERMINATION, BY RACE

SUMMARY OF DEFENDANT'S PERSONNEL HISTORIES AND OF JOY CHANDLER'S TESTIMONY AT CLASS CERTIFICATION HEARING

	NON-BLACKS		BLACKS	
INVOLUNTARILY TERMINATED	11%	(17)	20.0%	(3)
NOT INVOLUNTARILY TERMINATED	89%	(133)	80.0%	(12)
TOTAL	100.0%	(150)	100.0%	(15)

DEFENDANT'S EXHIBIT 1

SALARY COMPARISON—TELLERS

	10/21/79	3/1/80	3/1/81
CLARA WATSON	655	700	765
MILDRED DAY	660	660	765
JULIE GIFFORD	—*	—*	725
LINDA SHELL	600	650	735
TRICIA O'KEEFE	—**	—**	—**

*Did not start until 10/9/80.

**Not employed during class period, left in 1976.

DEFENDANT'S EXHIBIT 2

APPLICANT DATA

October 21, 1979-March 1, 1984

TOTAL APPLICANTS DURING RELEVANT PERIOD	789	
Blacks	145	18.4%
Non-Blacks	581	73.6%
Unknown	63	8.0%
TOTAL JOBS AVAILABLE	87	
TOTAL OPENINGS SOUGHT BY BLACKS	35	
Percent of Available Jobs		40.2%
TOTAL APPLICANTS WHEN JOBS AVAILABLE	277	
Blacks	63	22.7%
Non-Blacks	214	77.3%
BLACKS HIRED OR OFFERED JOBS	7	
HIRE RATIO (7 of 35)		20.0%
ESTIMATED BLACK HIREES IF BLACKS HAD APPLIED FOR ALL OPENINGS	17.4	
SECRETARIAL JOBS OPEN DURING RELEVANT PERIOD	10	
TOTAL APPLICANTS	23	
Blacks	1	4.3%
Non-Blacks	22	95.7%
CASH MANAGEMENT JOBS OPEN DURING RELEVANT PERIOD (All opening filled from within—No Black employees applied)	0	

DEFENDANT'S EXHIBIT 3

March 1, 1984

Survey of Utilization of Blacks: Tarrant County Banks
70 Million-150 Million In Assets

Bank No.	Total Non-Exempt Employees	Total Black Non-Exempt Employees	Total Black Supervisors	Ratio of Black Employees To All Employees
1	82	1	0	1.2%
2	59	3	1	5.1%
3	53	5	0	9.4%
4	68	15	0	22.1%
5	52	2	0	3.9%
6	70	3	0	4.3%
7	90	10	2	11.1%
8	76	3	0	4.0%
9	44	10	0	22.7%
10	87	1	0	1.2%
11	68	1	0	1.5%
12	39	2	0	5.1%
13	46	0	0	0.0%
14	40	5	0	12.5%
Average	62.4	4.4	0.2	7.1%
FWBT	61.0	8.0	1.0	13.1%

DEFENDANT'S EXHIBIT 4

FORT WORTH BANK and TRUST

Salary Computations by Grade for 10/21/79

GRADE	OVERALL AVG. SALARY	BLACK AVG. SALARY	NON-BLACK AVG. SALARY
1	580.20	550.00	600.33
2	575.00	610.00	557.50
3	610.00	550.00	630.00
4	634.43	597.33	643.70

FORT WORTH BANK and TRUST

Salary Computations by Grade for 3/1/80

GRADE	OVERALL AVG. SALARY	BLACK AVG. SALARY	NON-BLACK AVG. SALARY
1	570.40	565.00	574.00
2	598.75	600.00	597.50
4	657.86	654.00	658.64

FORT WORTH BANK and TRUST

Salary Computations by Grade for 3/1/81

GRADE	OVERALL AVG. SALARY	BLACK AVG. SALARY	NON-BLACK AVG. SALARY
1	585.00	585.00	0.00
2	625.83	652.50	612.50
4	726.81	720.00	728.33
5	713.61	720.00	712.55

FORT WORTH BANK and TRUST

Salary Computations by Grade for 3/1/82

GRADE	OVERALL AVG. SALARY	BLACK AVG. SALARY	NON-BLACK AVG. SALARY
1	699.00	699.00	0.00
2	747.50	765.00	741.66
3	738.50	869.00	608.00
5	856.66	857.75	856.47
6	850.62	880.00	960.71

FORT WORTH BANK and TRUST

Salary Computations by Grade for 3/1/83

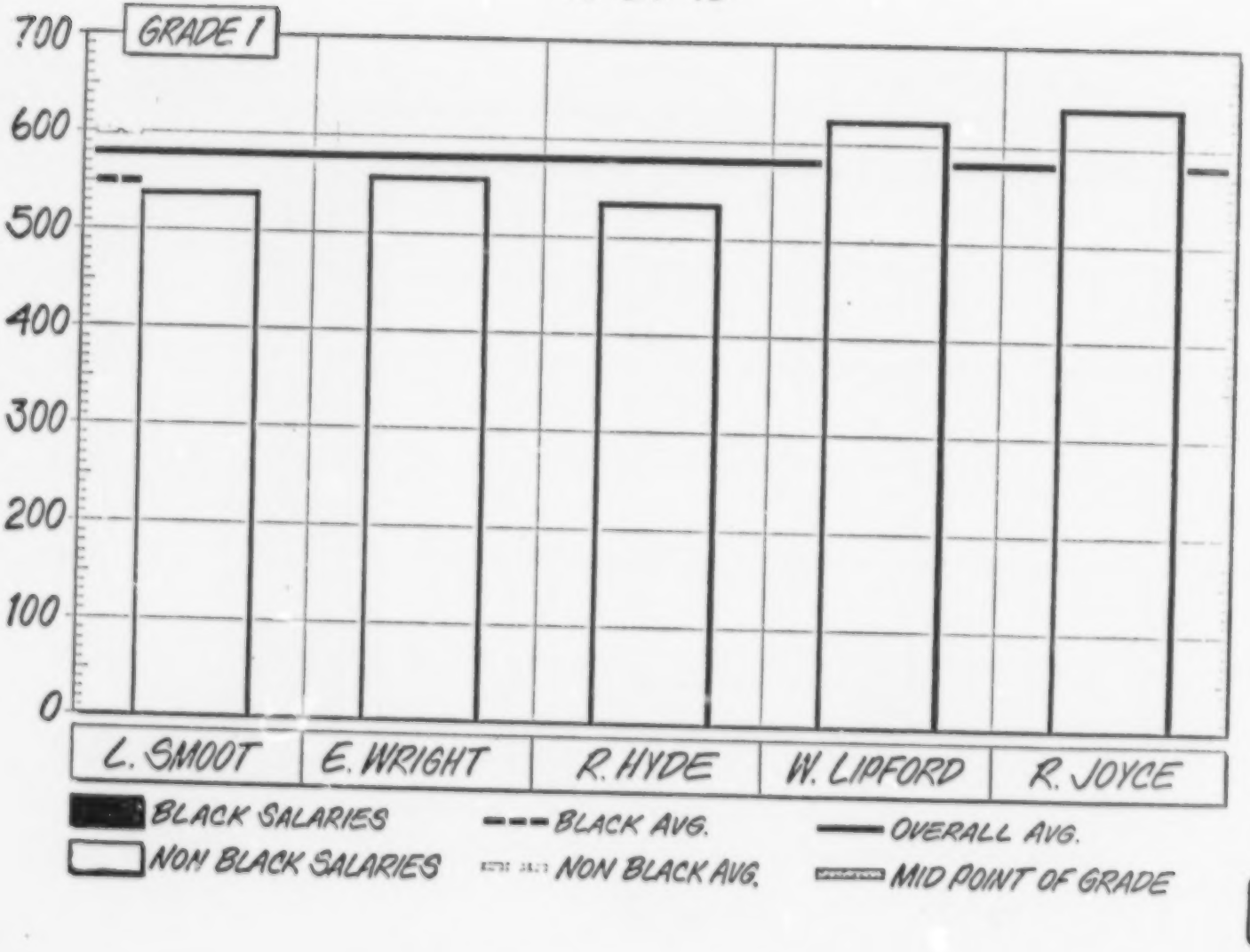
GRADE	OVERALL AVG. SALARY	BLACK AVG. SALARY	NON-BLACK AVG. SALARY
1	755.00	755.00	0.00
3	956.00	956.00	0.00
5	855.25	886.40	885.00
6	967.50	950.00	971.00

FORT WORTH BANK and TRUST

Salary Computations by Grade for 3/1/84

GRADE	OVERALL AVG. SALARY	BLACK AVG. SALARY	NON-BLACK AVG. SALARY
1	800.00	800.00	0.00
4	924.33	1031.00	903.00
5	981.15	1016.75	976.07
6	1018.40	1017.00	1018.75
7	1214.87	1200.00	1217.00

10-21-79



DEFENDANT'S EXHIBIT 5A

DEFENDANT'S EXHIBIT 5

285

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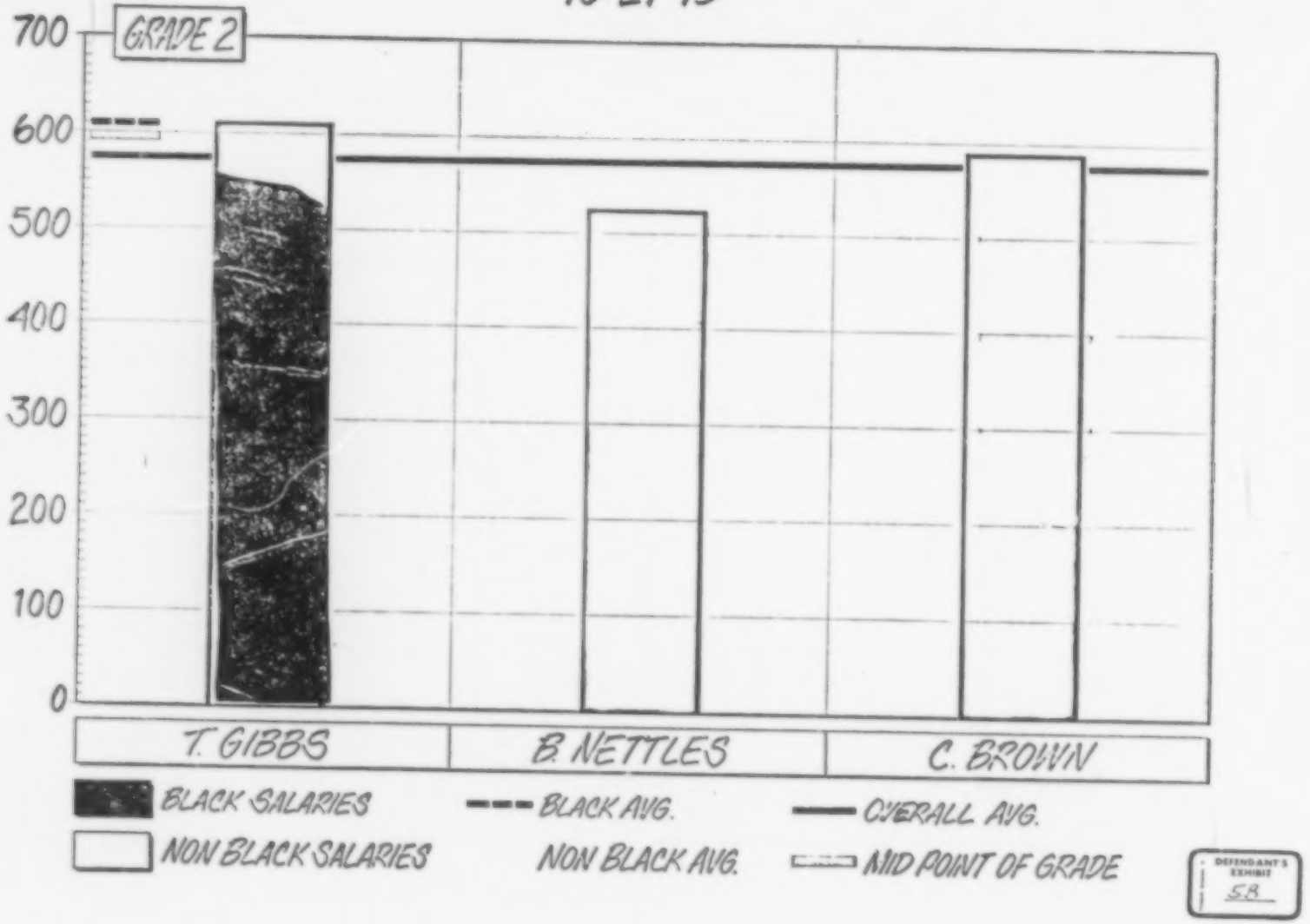
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700
600
500
400
300
200
100
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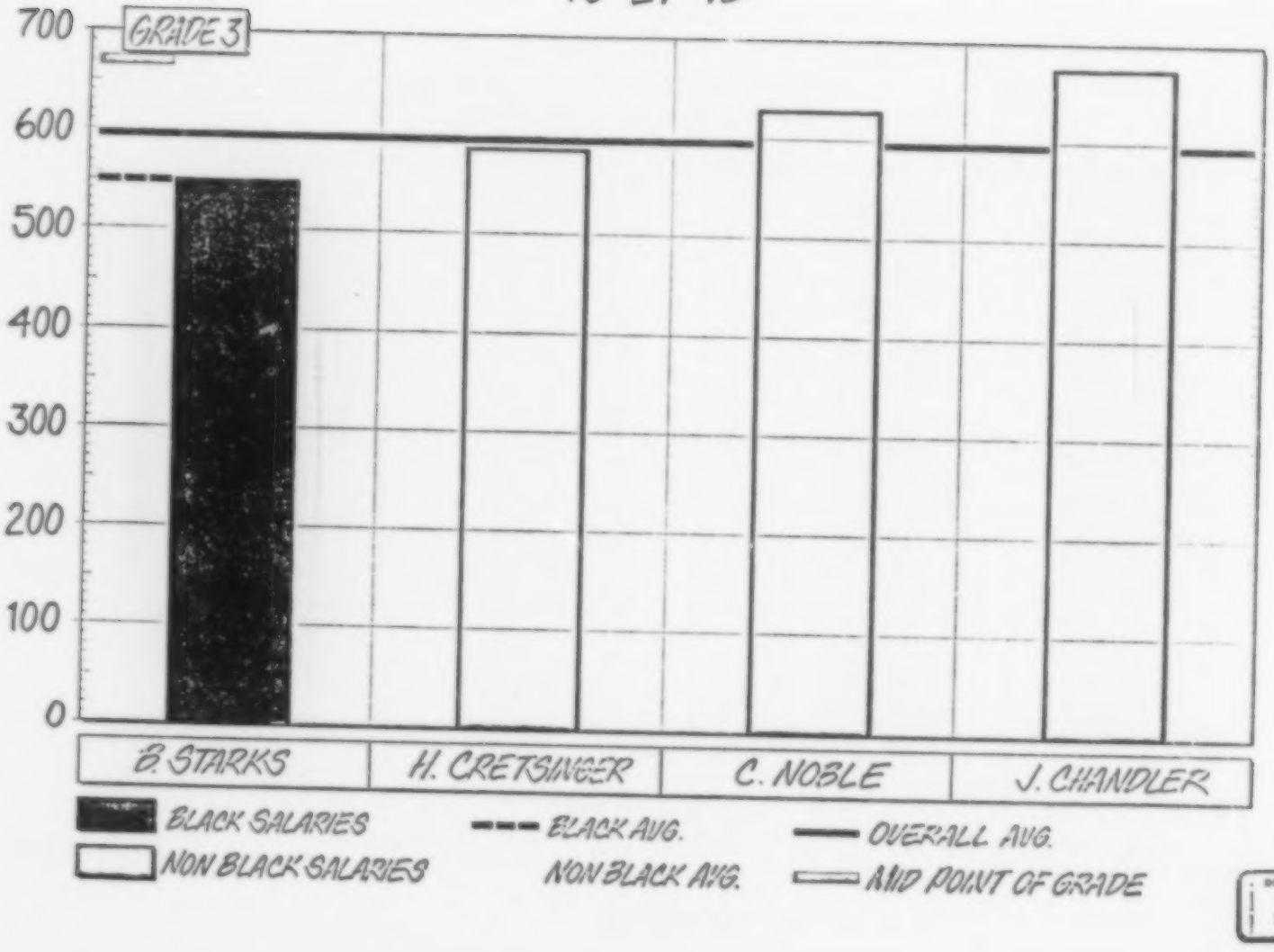
T. GIBBS
B. NETTLES
C. BROWN
BLACK SALARIES
BLACK AVG.
OVERALL AVG.
NON BLACK SALARIES
NON BLACK AVG.
MID POINT OF GRADE
DEFENDANT'S EXHIBIT
58

10-21-79



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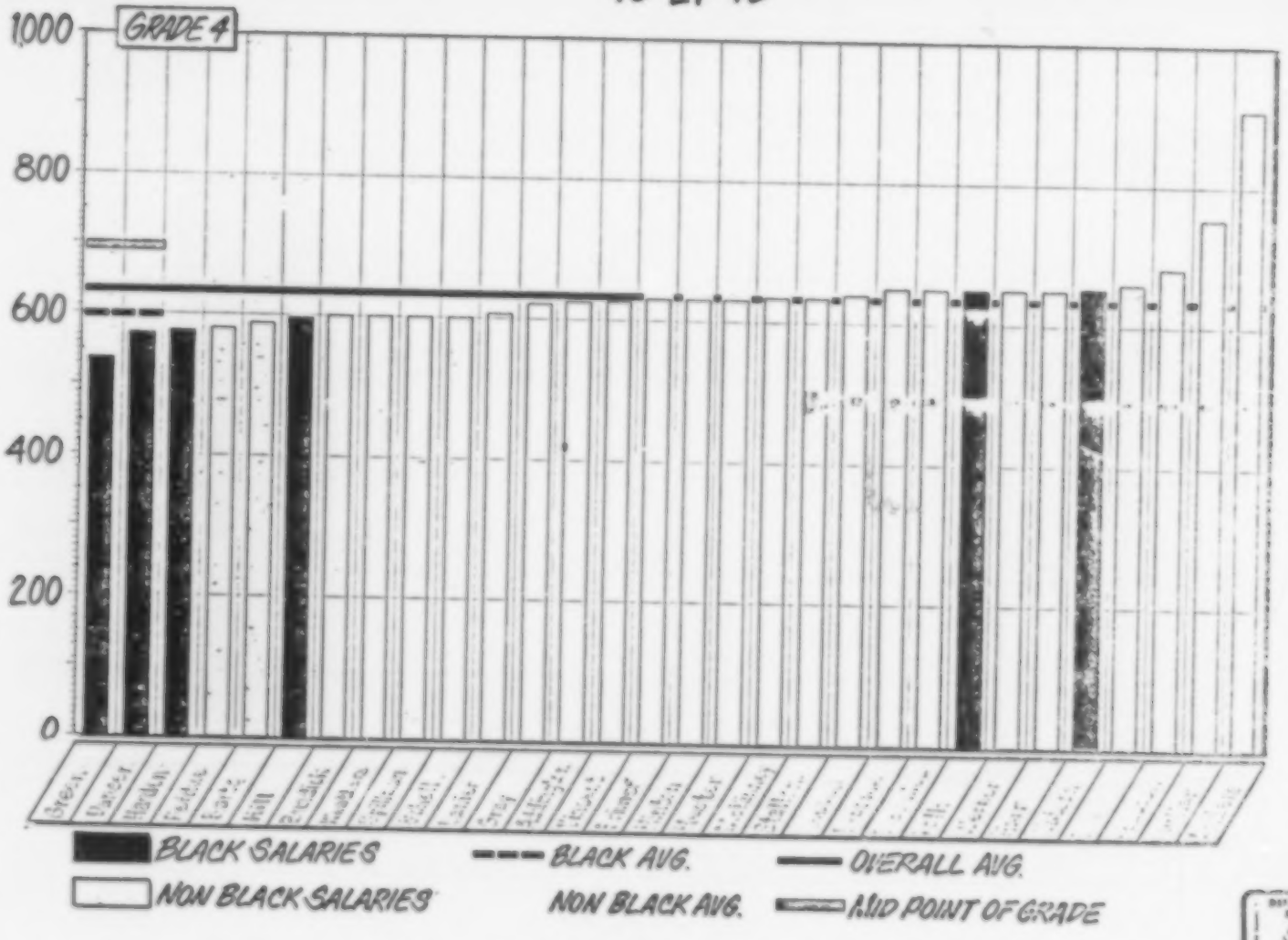
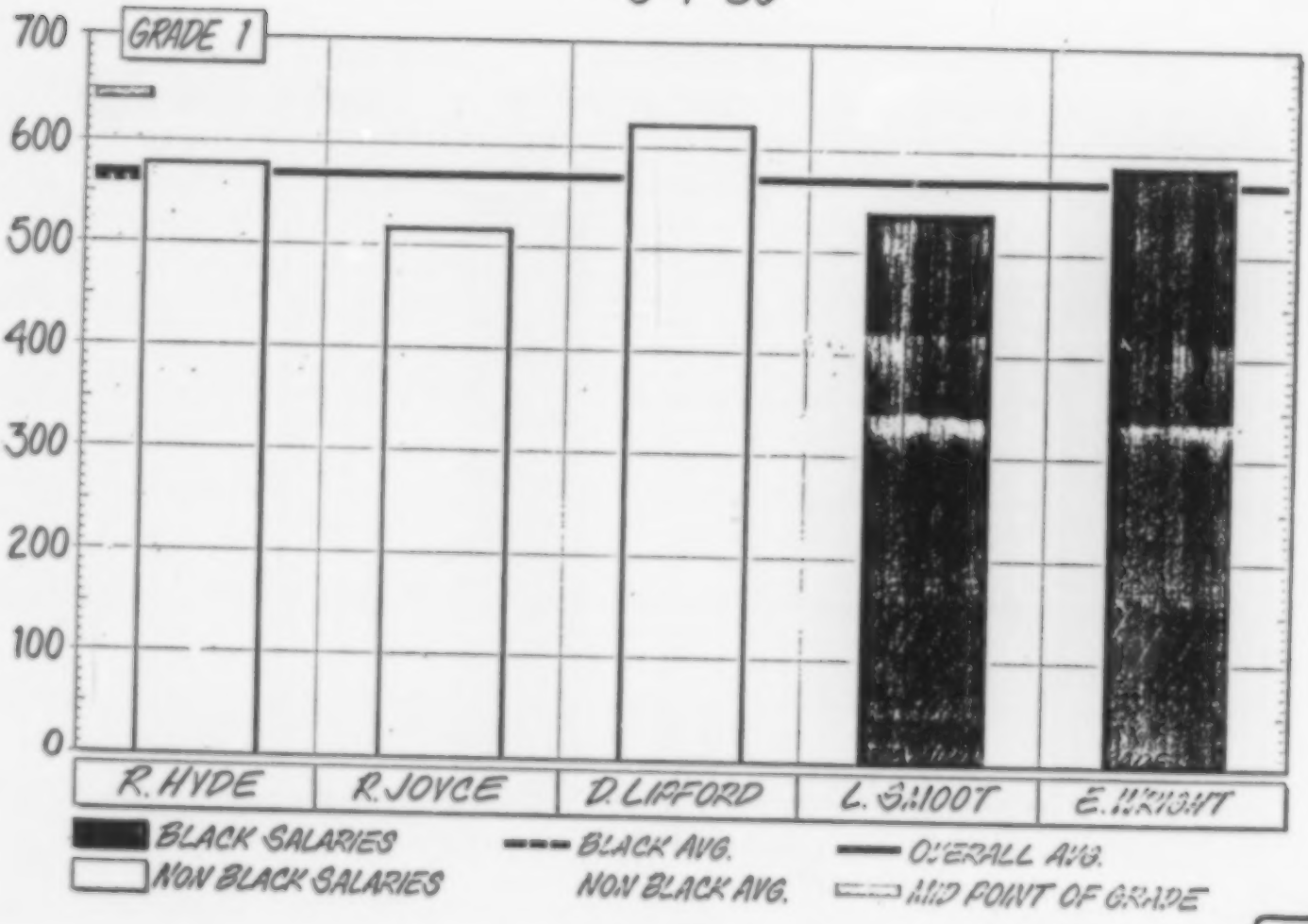

GRADE 4
1,000
800
600
400
200
0
BLACK SALARIES
NON BLACK SALARIES
BLACK AVG.
NON BLACK AVG.
OVERALL AVG.
MID POINT OF GRADE
DEFENDANT'S EXHIBIT
SD

3-1-80



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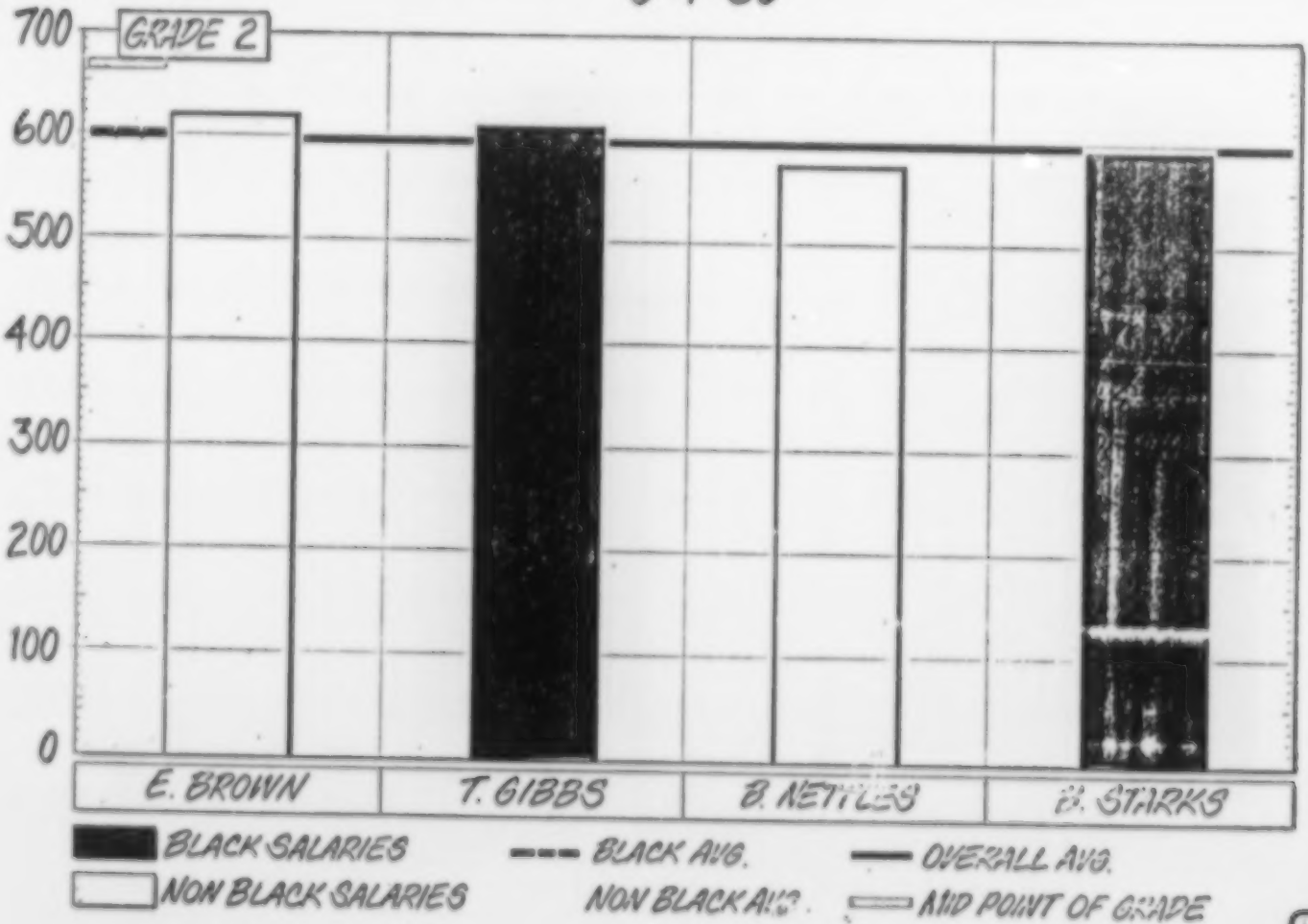
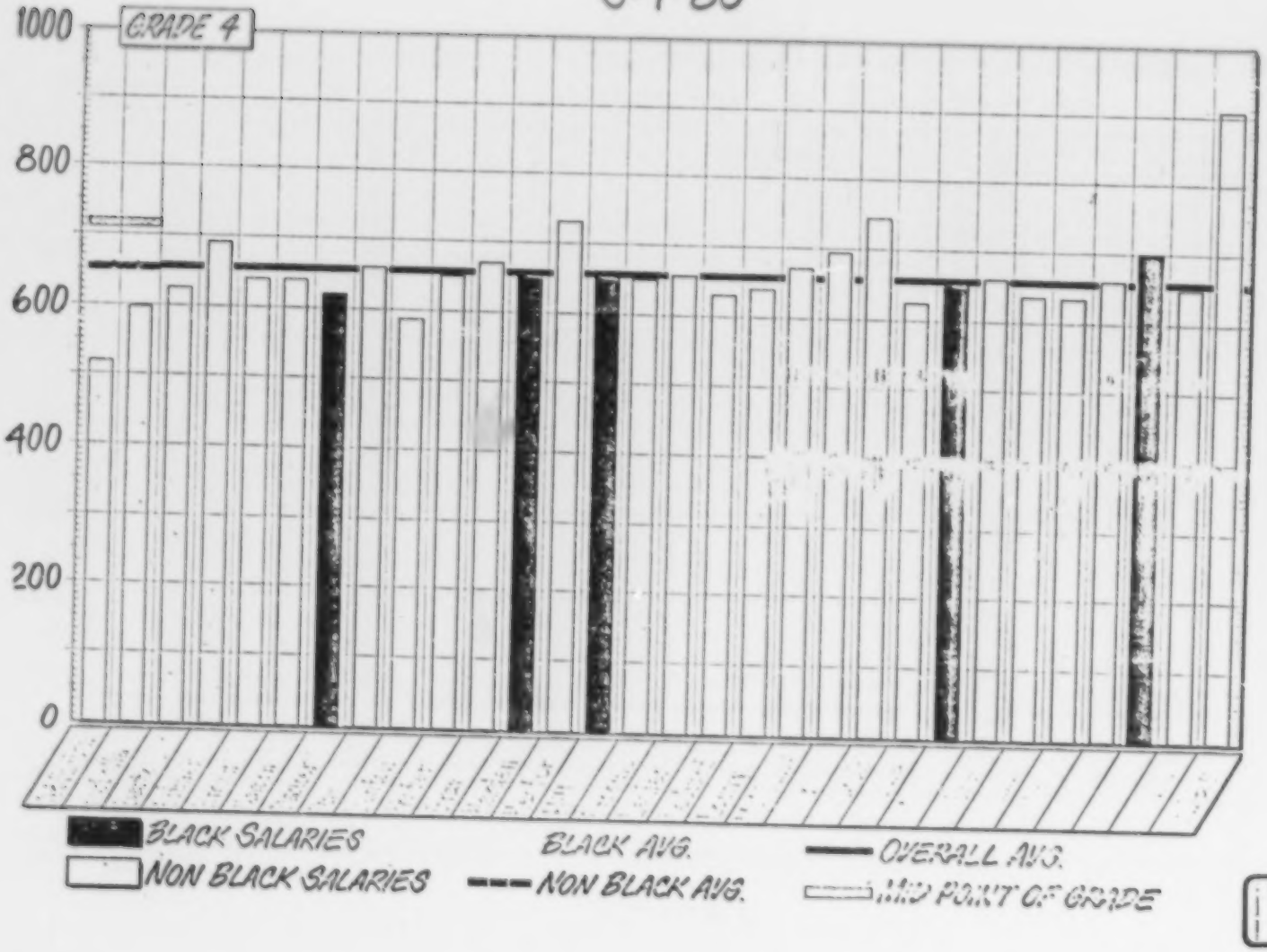
3-1-80


GRADE 2
700
600
500
400
300
200
100
0
E. BROWN
T. GIBBS
B. NETTLES
B. STARKS
BLACK SALARIES
NON BLACK SALARIES
BLACK AVG.
NON BLACK AVG.
OVERALL AVG.
MID POINT OF GRADE

3-1-80



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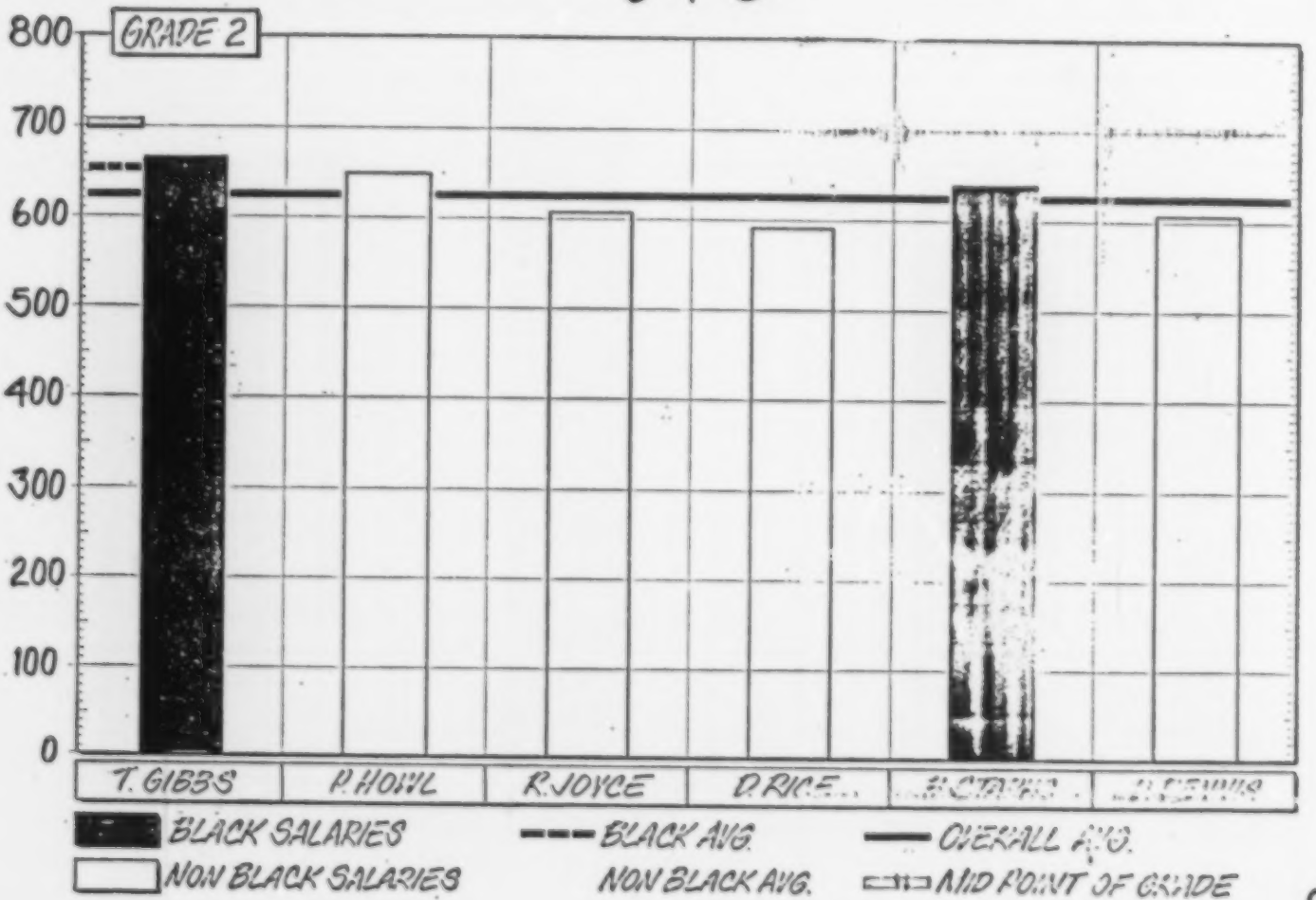

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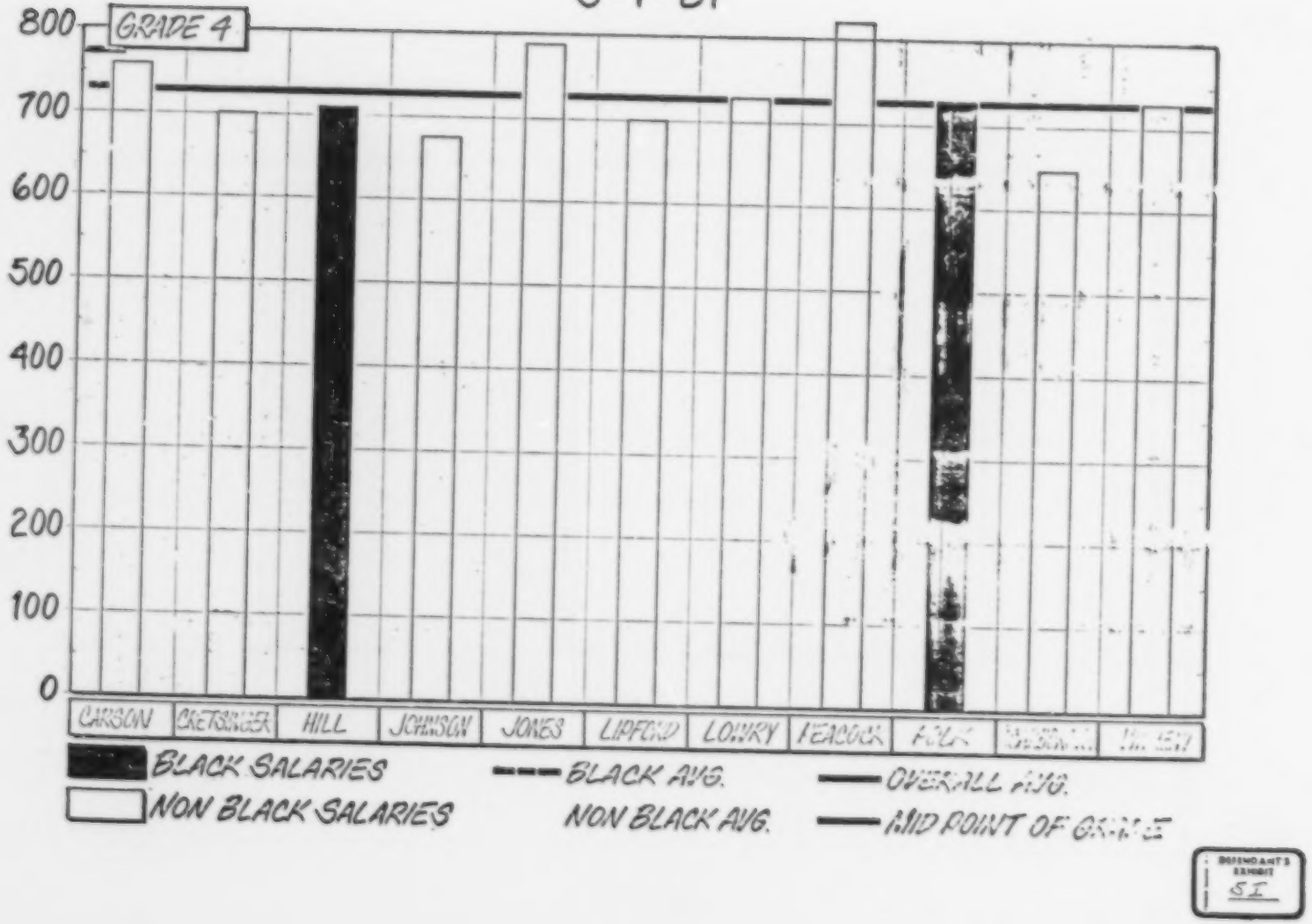

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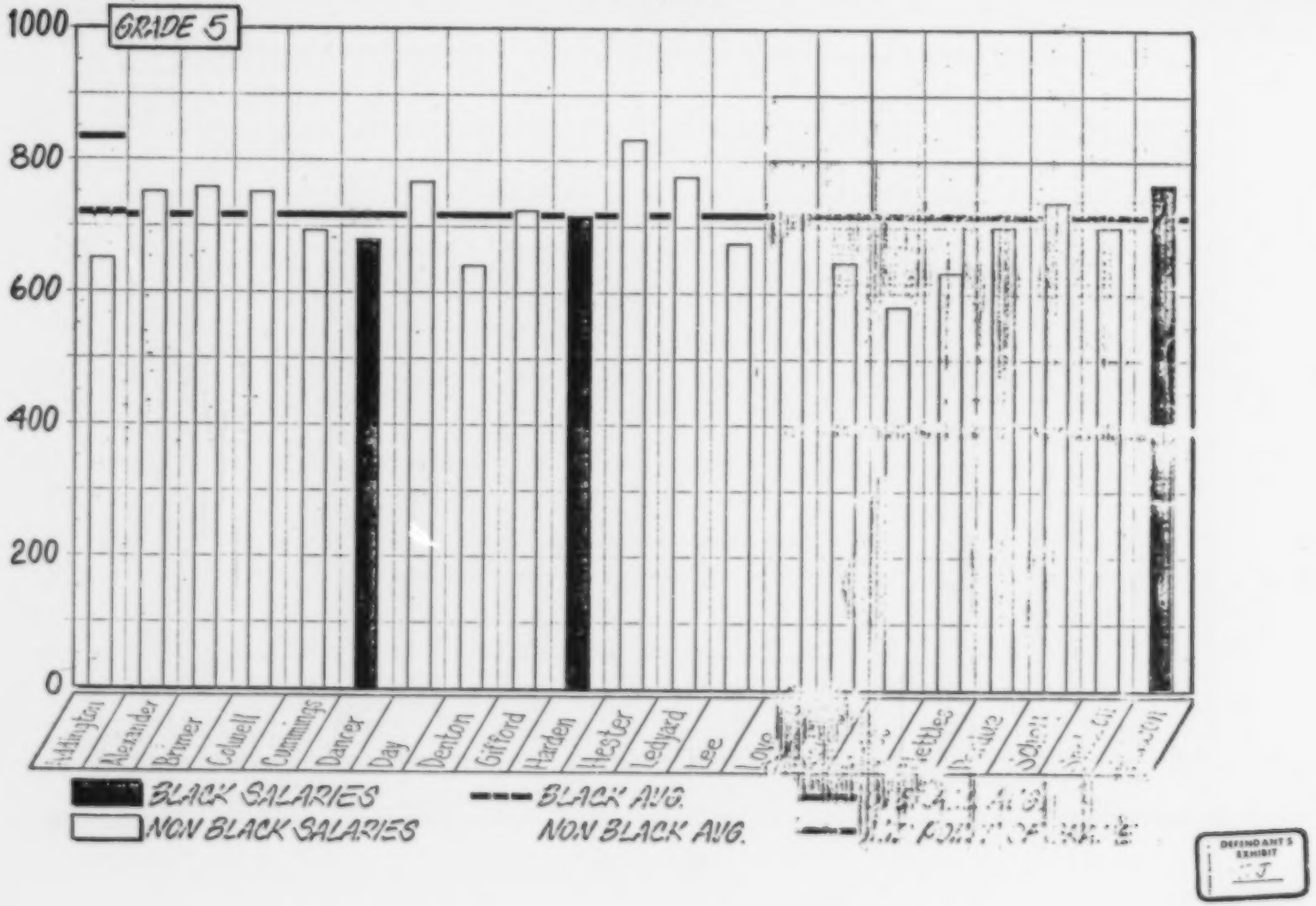

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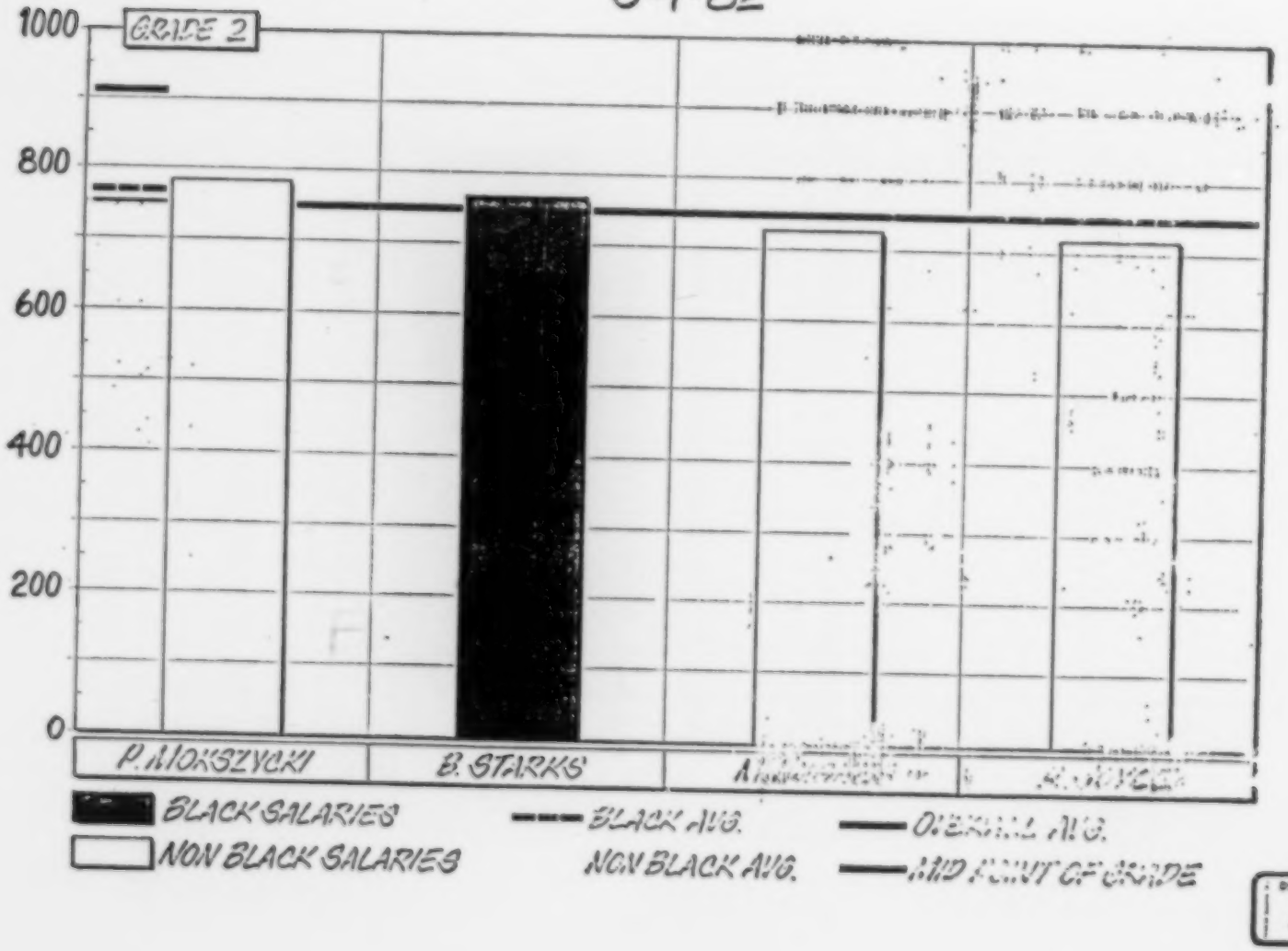

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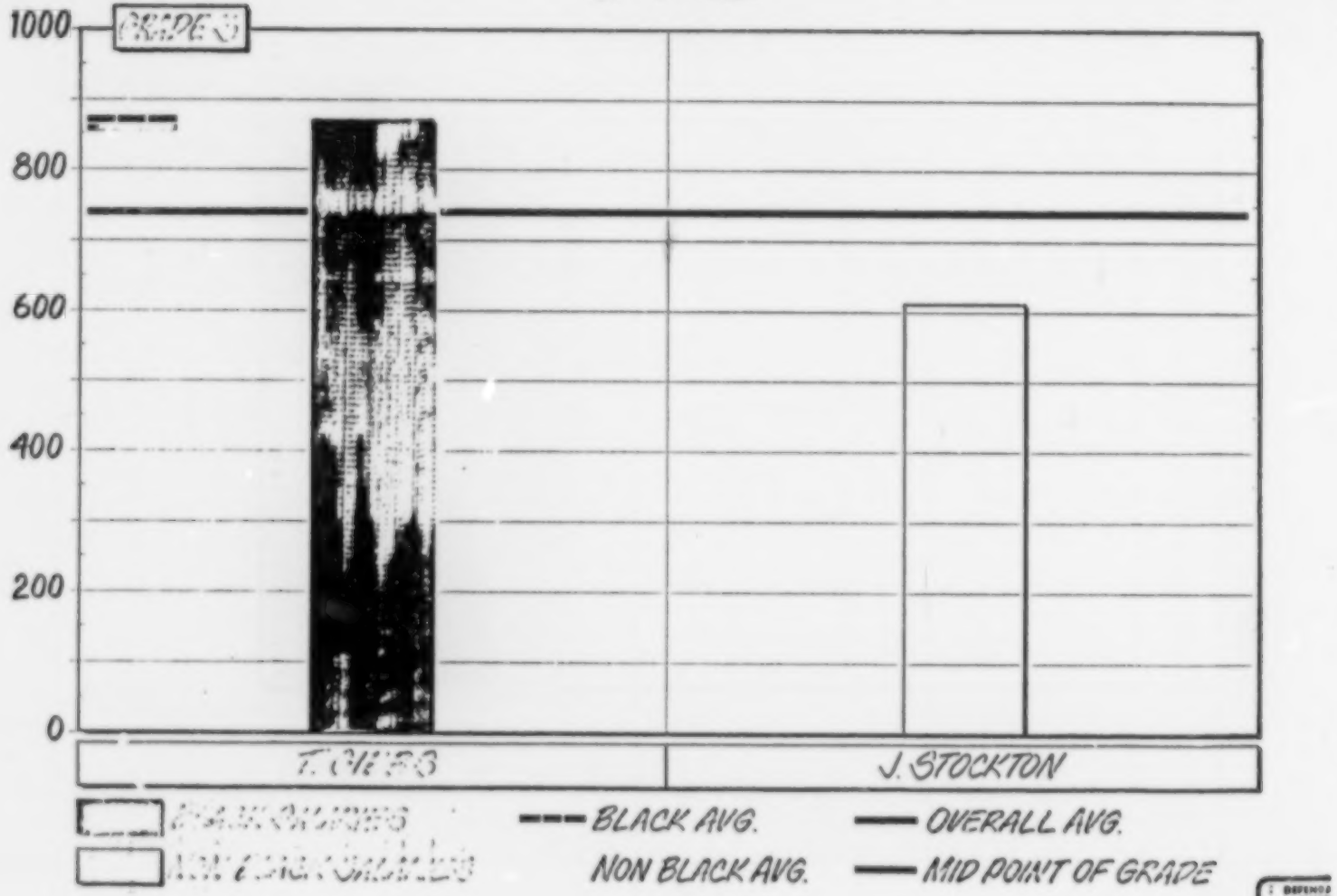
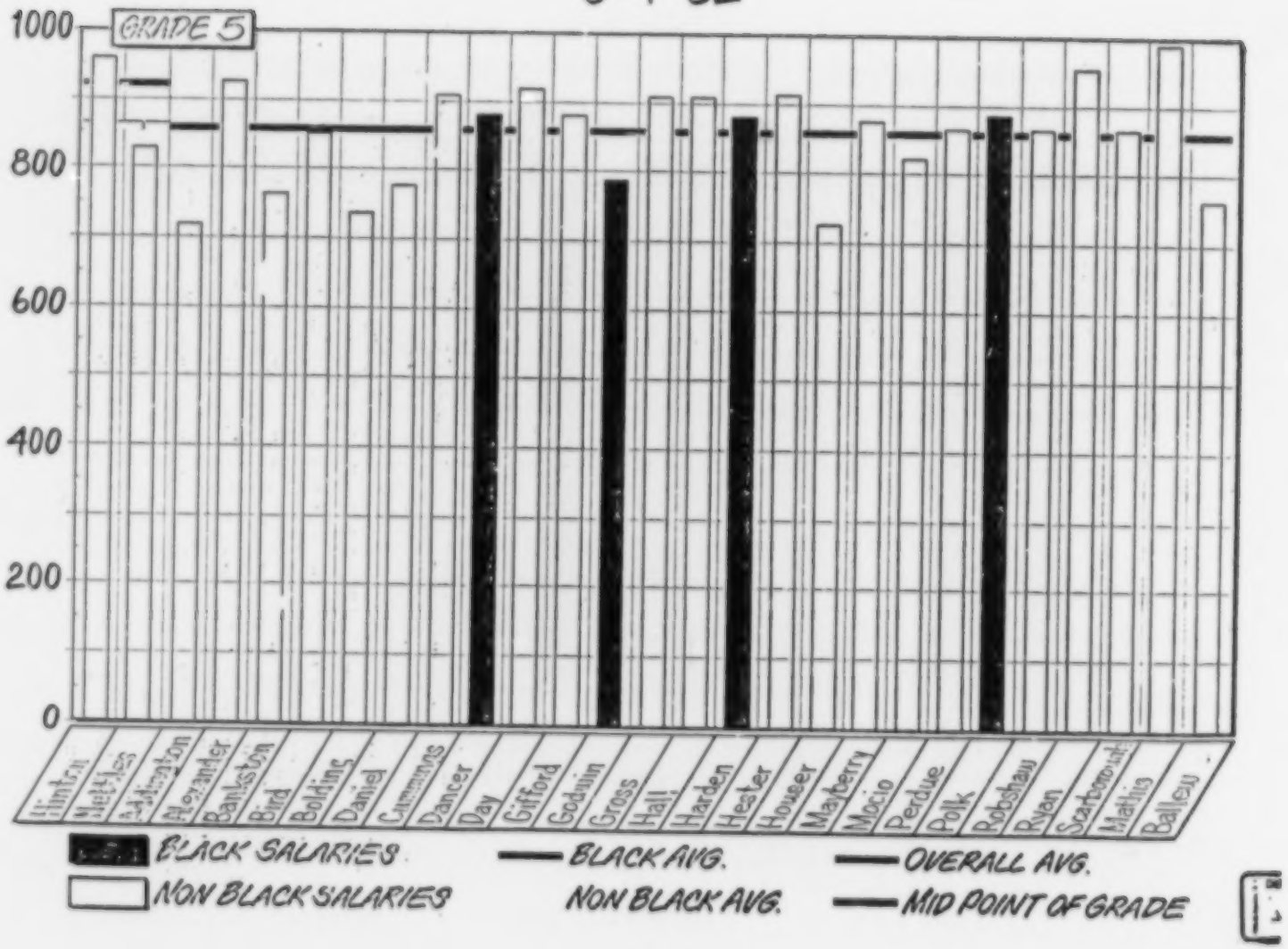
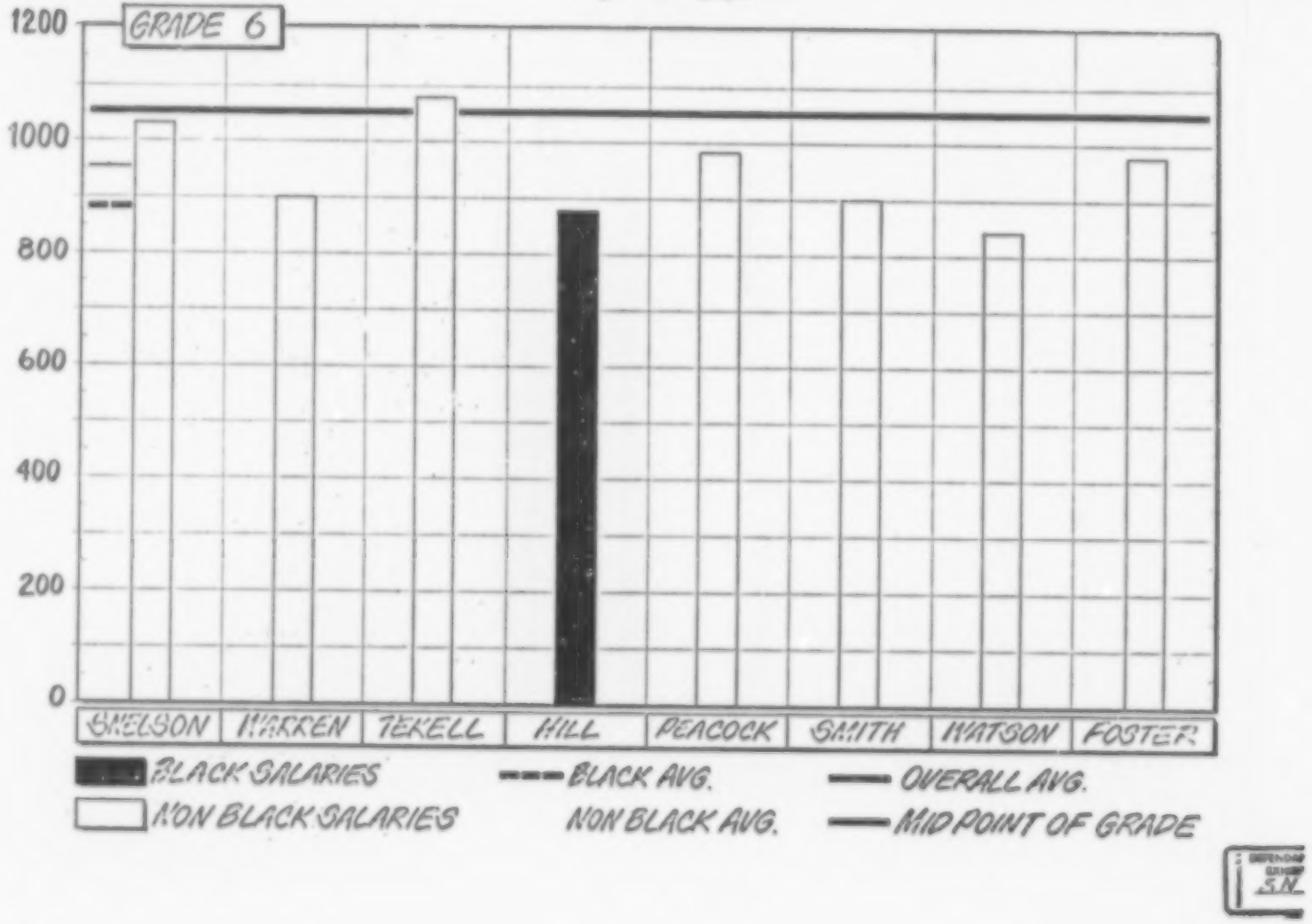
3-1-82


1000
800
600
400
200
0
GRADES
T. CHEEKS
J. STOCKTON
BLACK AVG.
OVERALL AVG.
NON BLACK AVG.
MID POINT OF GRADE

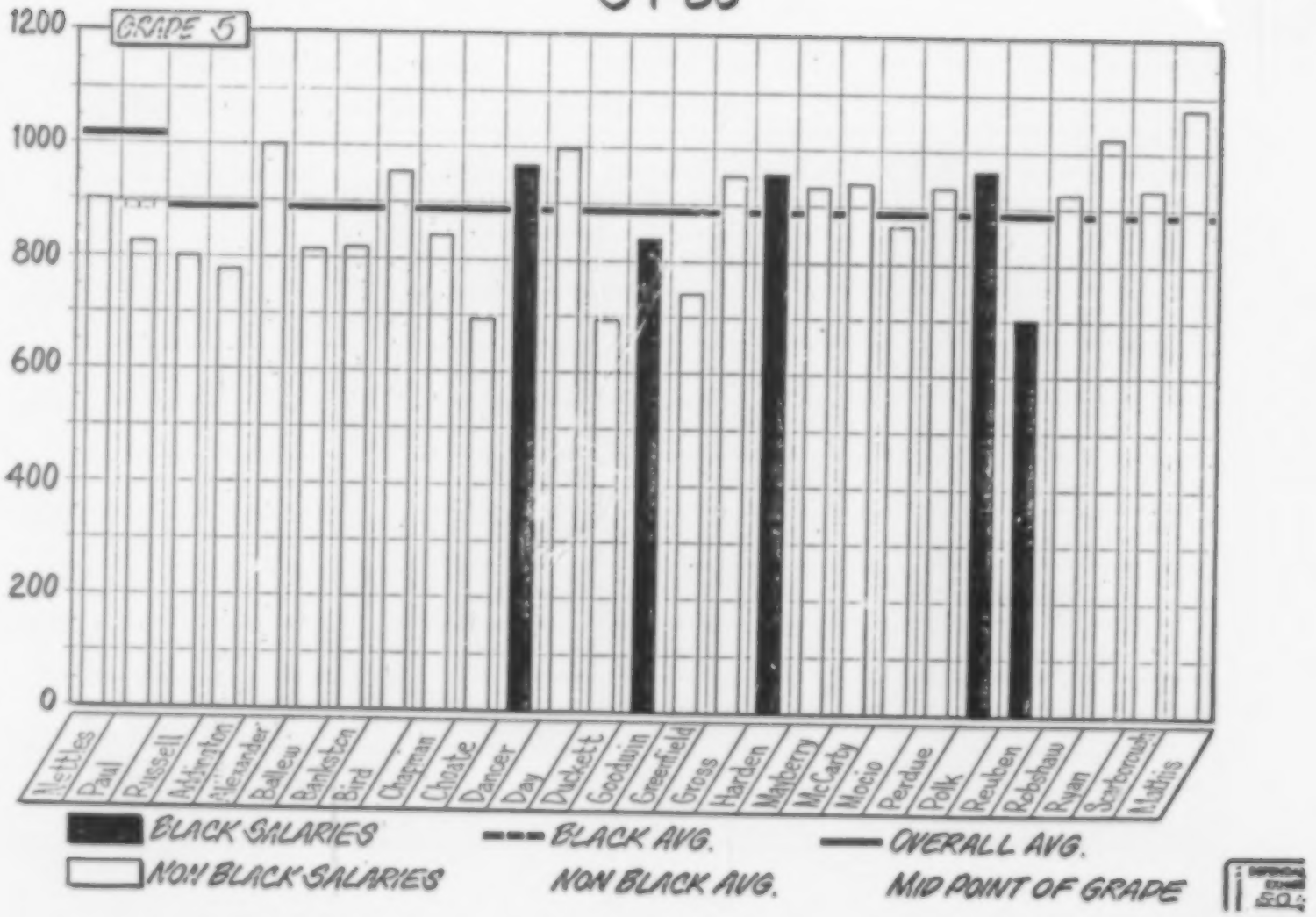
3-1-82


GRADE 5
1000
800
600
400
200
0
Hinton
Mathias
Edmonston
Alexander
Bankston
Bird
Bolding
Daniel
Cummings
Dancer
Day
Gifford
Godwin
Gross
Hall
Harden
Hester
Howser
Mayberry
Mocio
Perdue
Polk
Robshaw
Ryan
Scarborough
Mathis
Ballew
BLACK SALARIES
NON BLACK SALARIES
BLACK AVG.
NON BLACK AVG.
OVERALL AVG.
MID POINT OF GRADE

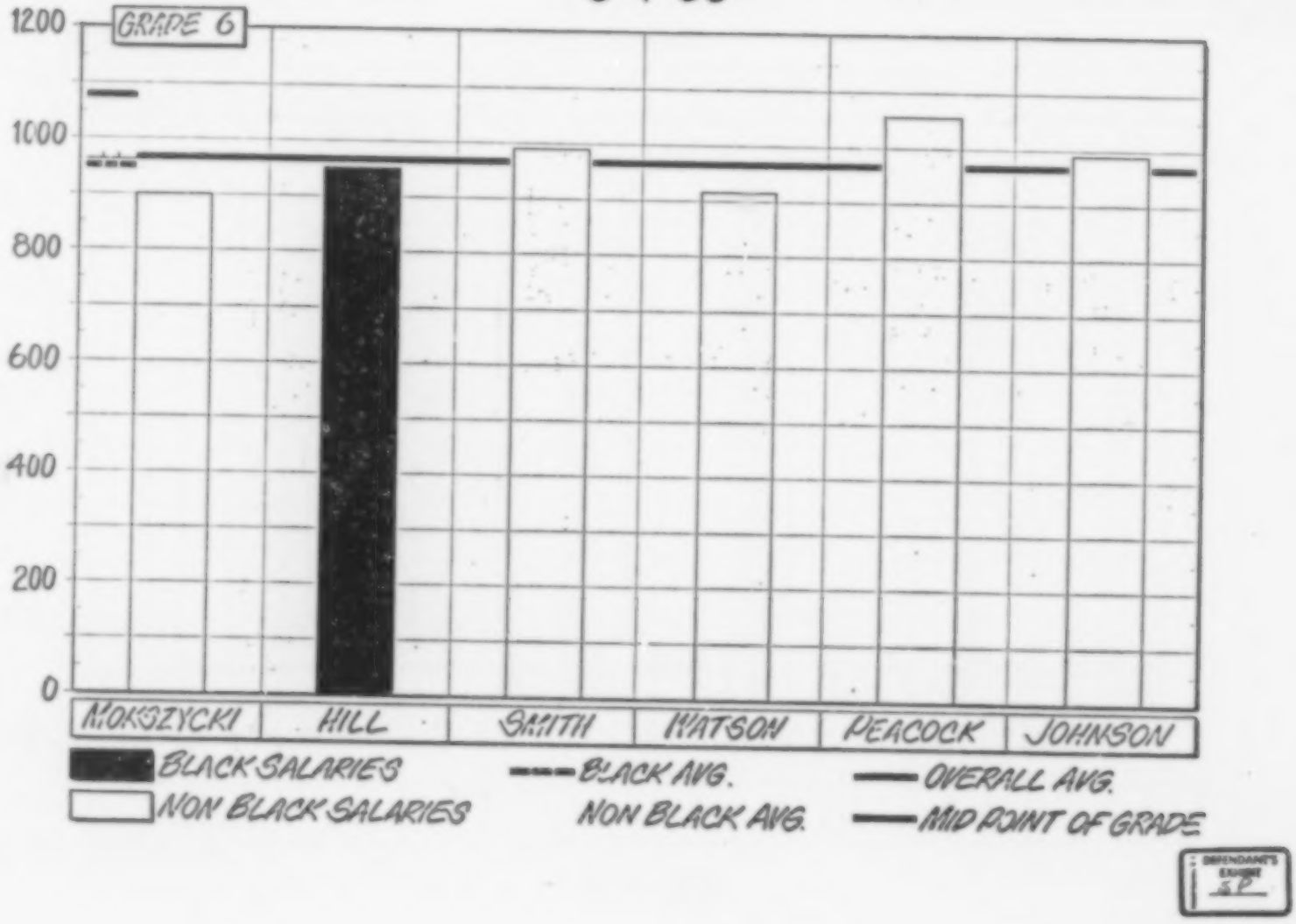
3-1-82


GRADE 6
1200
1000
800
600
400
200
0
NELSON
WARREN
TEKELL
HILL
PEACOCK
SMITH
WATSON
FOSTER
BLACK SALARIES
NON BLACK SALARIES
BLACK AVG.
NON BLACK AVG.
OVERALL AVG.
MID POINT OF GRADE

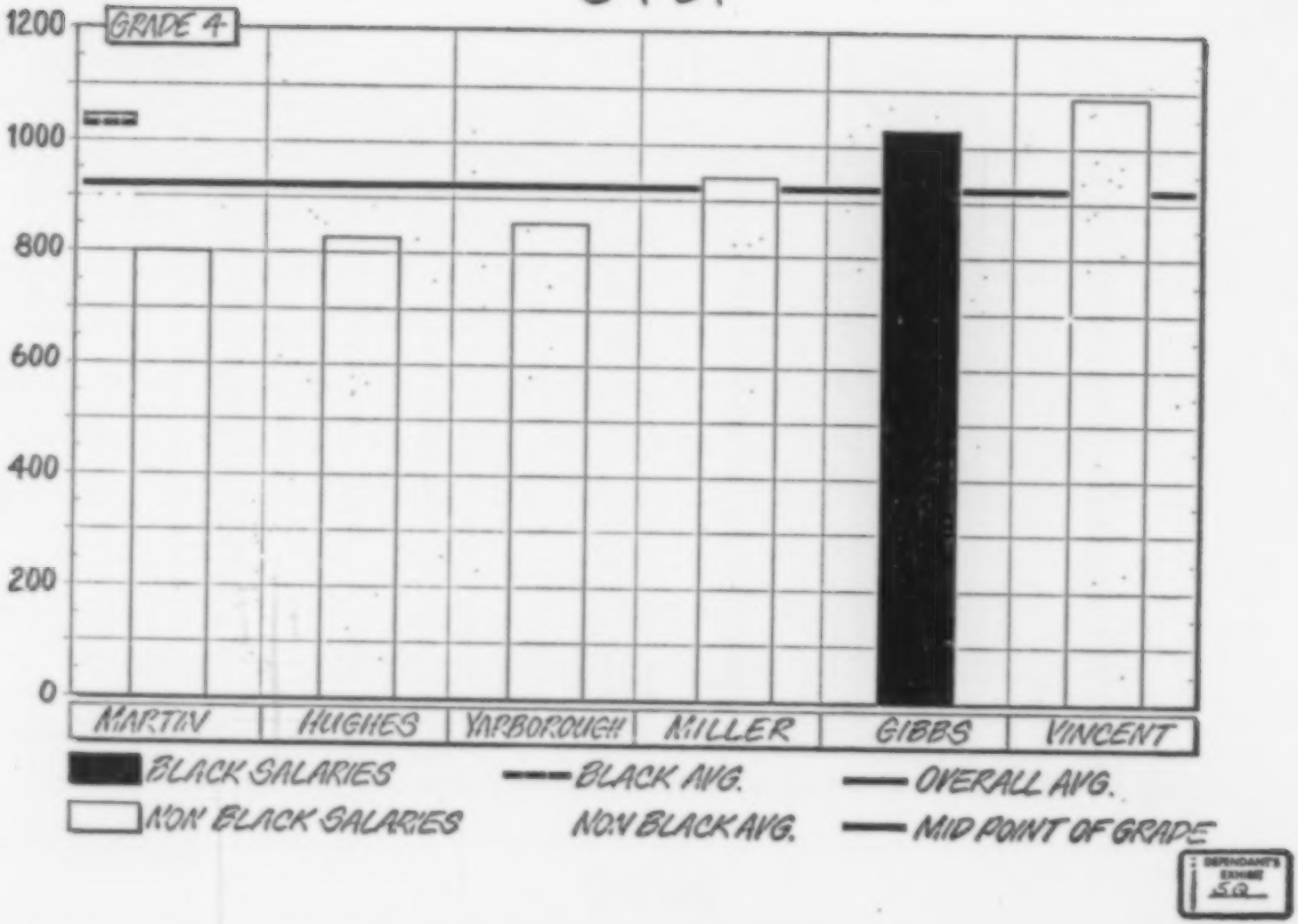
3-1-83


GRADE 5
1200
1000
800
600
400
200
0
Mettles
Paul
Russell
Atkinson
Alexander
Ballew
Bankston
Bird
Chapman
Choate
Dancer
Day
Duckett
Goodwin
Greenfield
Gross
Harden
Matherny
McCarty
Mocio
Perdue
Polk
Reuben
Robshaw
Ryan
Scarborough
Mathis
BLACK SALARIES
NON BLACK SALARIES
BLACK AVG.
NON BLACK AVG.
OVERALL AVG.
MID POINT OF GRADE

3-1-83

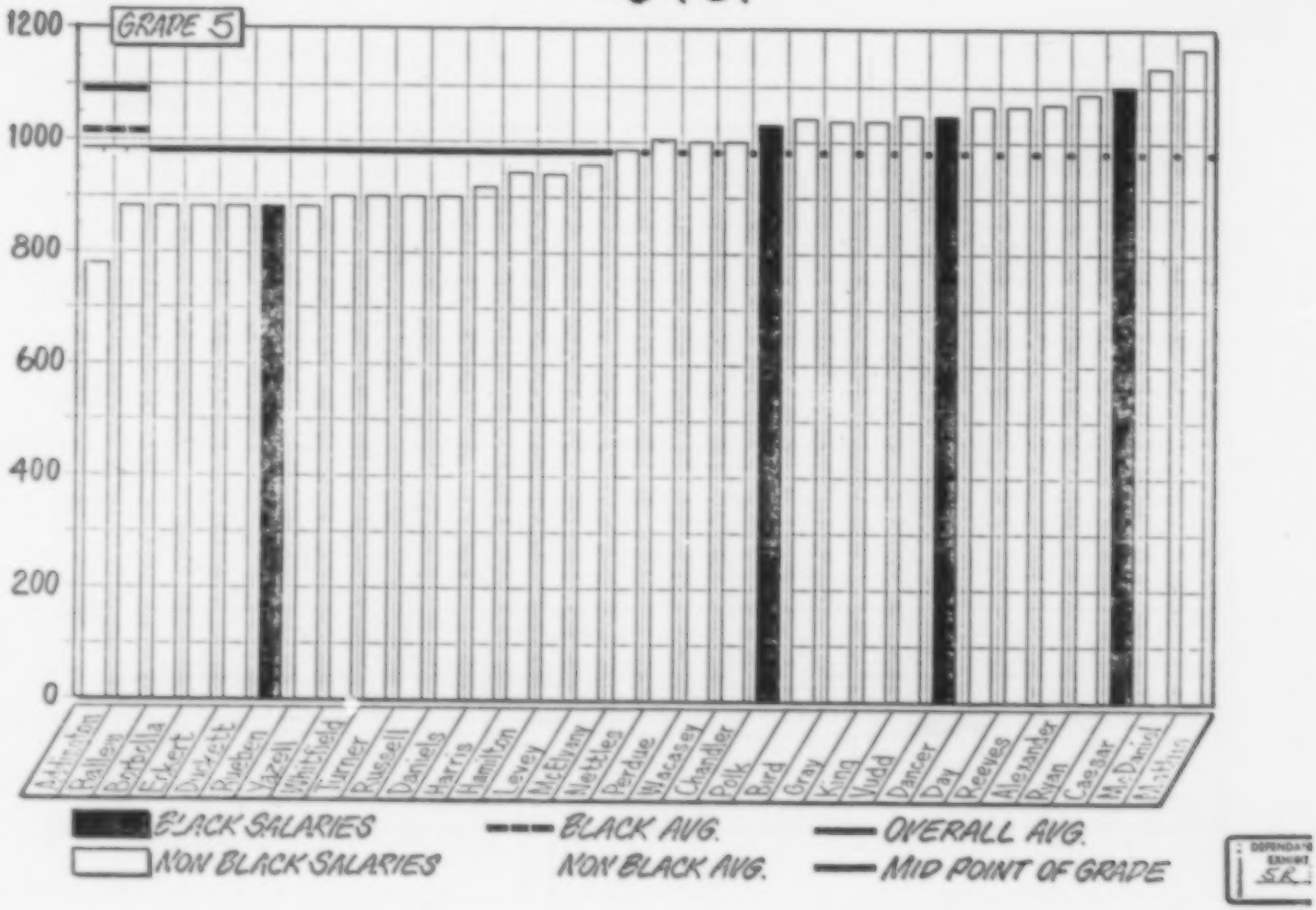

GRADE 6
1200
1000
800
600
400
200
0
MOKSZYCKI
HILL
SMITH
WATSON
PEACOCK
JOHNSON
BLACK SALARIES
NON BLACK SALARIES
BLACK AVG.
NON BLACK AVG.
OVERALL AVG.
MID POINT OF GRADE

3-1-84

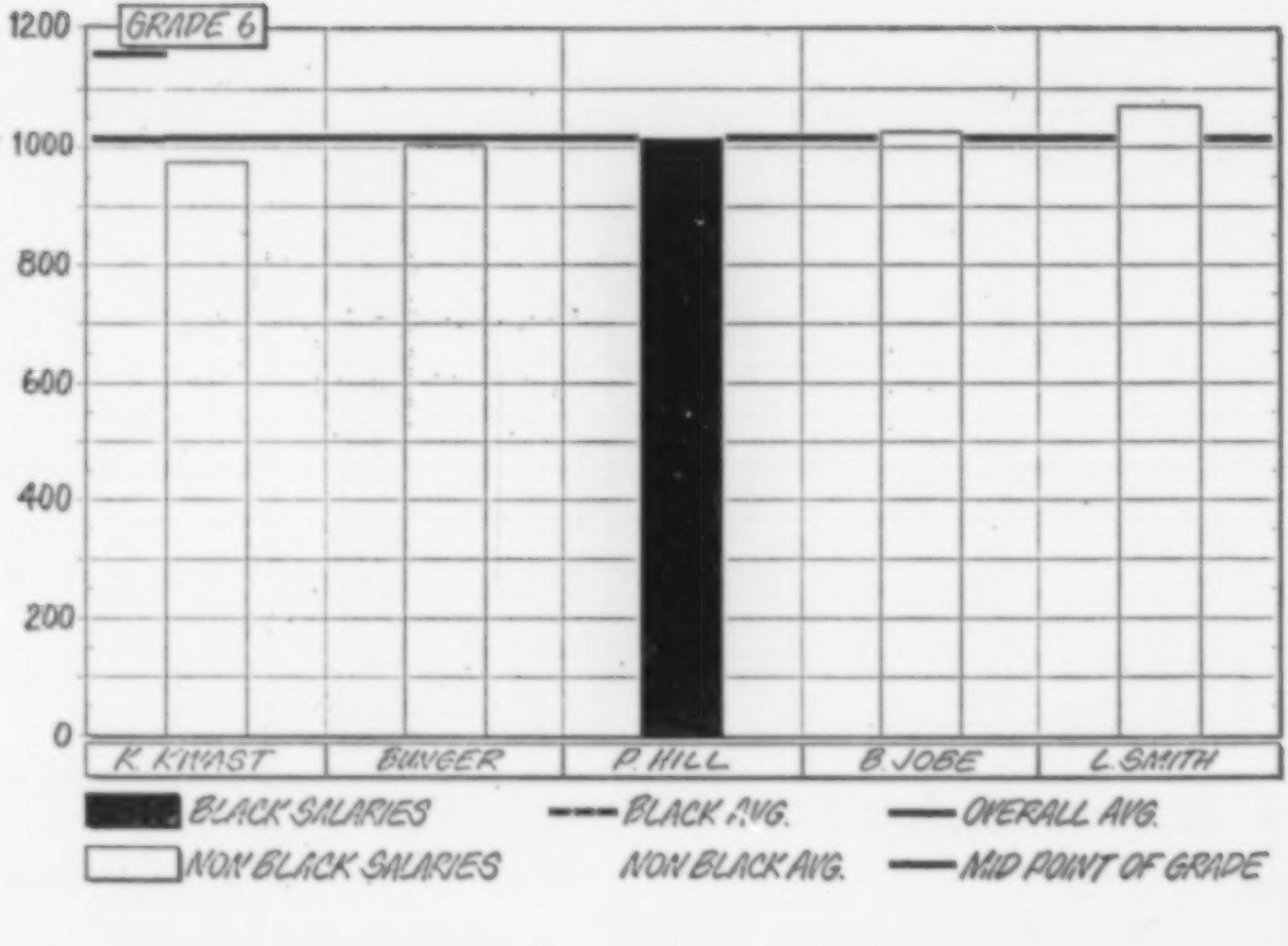


DEFENDANT'S EXHIBIT 45-Q

3-1-84

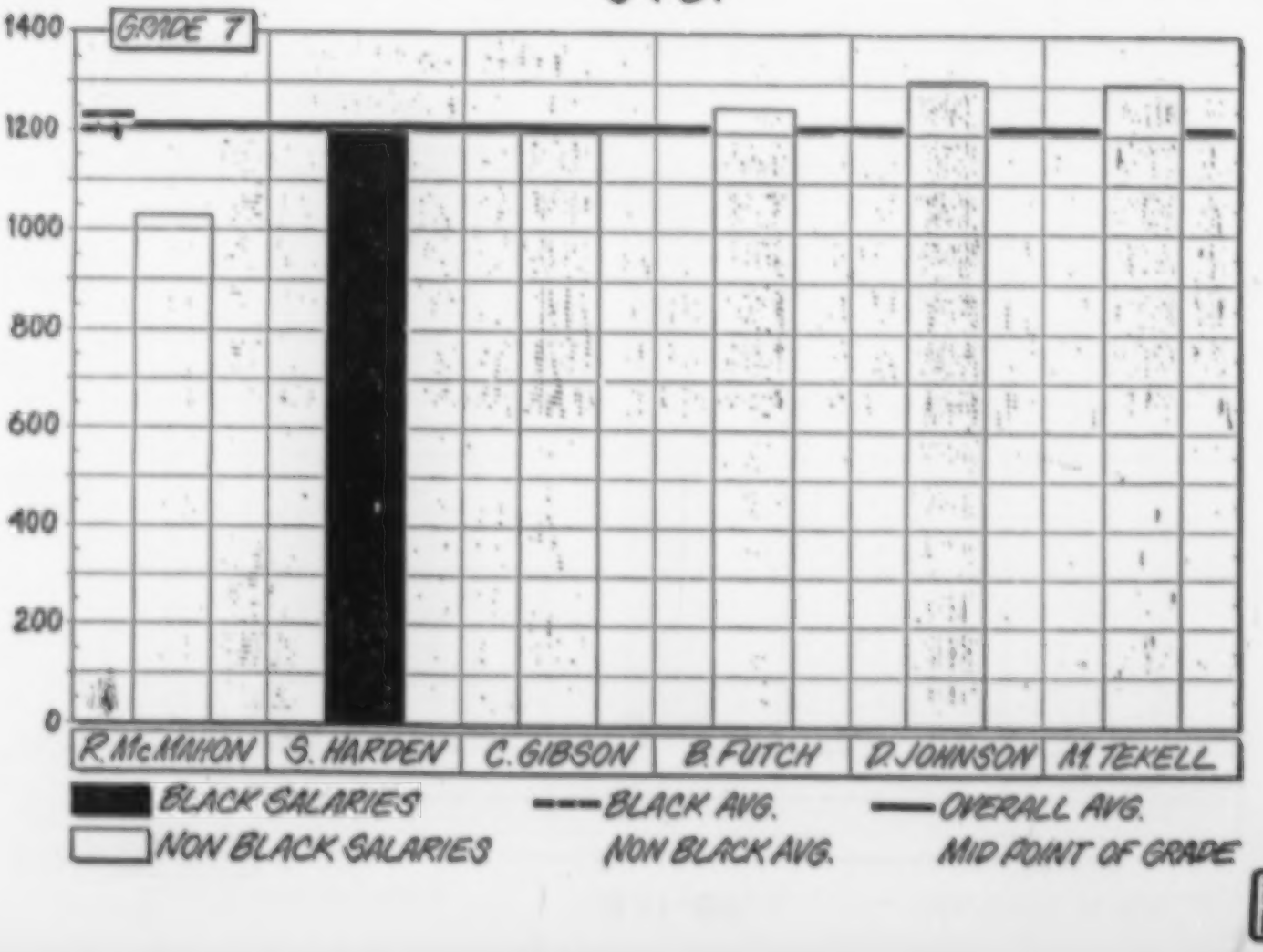

GRADE 5
1200
1000
800
600
400
200
0
A.Hamilton
Hallem
Burbella
Eckert
Durrett
Rueben
Yazell
Whitfield
Turner
Russell
Daniels
Harris
Hamilton
Levey
McElvany
Nettles
Perdue
Wacasey
Chandler
Polk
Bird
Gray
King
Yudd
Dancer
Day
Reeves
Alexander
Ryan
Caesar
M.Daniel
BLACK SALARIES
NON BLACK SALARIES
BLACK AVG.
NON BLACK AVG.
OVERALL AVG.
MID POINT OF GRADE

3-1-84



DEFENDANT'S EXHIBIT 55

3-1-84


GRADE 7
1400
1200
1000
800
600
400
200
0
R. McMAHON
S. HARDEN
C. GIBSON
B. FUTCH
D. JOHNSON
M. TEKELL
BLACK SALARIES
NON BLACK SALARIES
BLACK AVG.
NON BLACK AVG.
OVERALL AVG.
MID POINT OF GRADE

DEFENDANT'S EXHIEIT 6

[redacted] 81 581 EMPLOYEE GRADE AND SALARY HISTORY

NO.	EMPLOYEE NAME	START DATE	START GRADE	START SALARY	3-1-80 GRADE	3-1-80 SALARY	3-1-81 GRADE	3-1-81 SALARY	3-1-82 GRADE	3-1-82 SALARY	3-1-83 GRADE	3-1-83 SALARY	END DATE	END GRADE	END SALARY
1		000000											000000		
2		000000											000000		
3	CAESAR C	021484	5	1100									030184	5	1100
4	DANCER J	102179	4	572	4	620	5	680	5	880	5	970	030184	5	1050
5	GIBBS T	102179	2	610	2	665	3	869	3	956			030184	4	1031
6	HARDEN S	102179	4	575	4	650	5	715	5	880	5	955	030184	7	1240
7	HILL P	102179	4	595	4	650	4	710	6	880	6	950	030184	6	1017
8	POLK M	102179	4	650	4	650	4	730	5	886	5	966	030184	5	1033
9	RUEBEN S	070182	5	650							5	701	030184	5	864
10	SMOOT L	102179	1	540	1	540	1	585	1	699	1	755	030184	1	660
11		000000											000000		
12	FLAKE A	062380	3	540									090580	3	540
13	GODWIN P	110281	5	607					5	785	5	840	020384	5	840
14	GREEN H	102179	4	537									120779	4	537
15	SANDERS J	042783	3	725									080983	3	725
16	STARKS B	102179	3	550	2	590	2	640	2	765			123182	3	610
17	WATSON C	102179	4	655	4	700	5	765					080781	5	765
18	WRIGHT E	102179	1	560	1	590							090180	1	590
19		000000											000000		
20	ADDINGTON E	102179	4	624	4	519	5	650	5	718	5	779	030184	5	760
21	ALEXANDER K	051980	5	700			5	750	5	924	5	1000	030184	5	1070
22	BALLEW G	080381	5	607					5	761	5	815	030184	5	884
23	BERRY T	102179	7	715	7	815	8	1000	9	1270	9	1375	030184	9	1485
24	BIRD B	030981	3	600					5	850	5	955	030184	5	1045
25	BORBOLLA H	050283	5	693									030184	5	884
26	BRIMER L	102179	4	630	4	690	5	755	7	996	7	1116	030184	7	1206
27	BROWNLEE L	102179	4	650	4	650	6	790	6	979	9	1087	030184	9	1296
28	BUNGER R	032883	3	700									030184	6	1065
29	CHANDLER D	101183	5	1000									030184	5	1000
30	CHANDLER J	102179	3	675	8	800	8	975					061581	8	975
31	COLWELL L	052780	5	650			5	750	7	990	7	1110	030184	7	1220
32	COOKSEY A	102179	8	900	8	900	8	981	8	1189	8	1308	030184	8	1366
33	CULLAR P	102179	4	756	8	835	9	1000	9	1238			030184	8	1238
34	DANIELS K	041381	5	607					5	776	5	846	060182	9	900
35	DAY M	102179	4	660	4	660	5	765	5	919	5	995	030184	5	1065
36	DEGROAT D	062883		1150									030184	5	1150
37	DUCKETT J	011483	5	693							5	692	030184	8	884
38	ECKERT A	042283	3	693									030184	5	884
39	FIELDS K	120583	3	867									030184	5	884
40	FUTCH B	041580	6	875			7	875	7	1084	7	1165	030184	3	650
41	GIBSON C	010984	7	1200									030184	7	1250
42	GRAY M	030184	5	1040									030184	7	1200
43	HAMILTON K	013183	3	700									030184	5	1040
44	HARRIS K	080983	5	850							4	700	030184	5	946
45	HOWARD C	081583		1040									030184	5	920
46	HUGHES M	122381	2	600									030184		1040
47	HUNT J	011083	7	1050					2	726	4	825	030184	4	825
48	JOBE B	050283	6	950							7	1050	030184	8	1250
													030184	6	1025

EMPLOYEE GRADE AND SALARY HISTORY

NO.	EMPLOYEE NAME	START DATE	START GRADE	START SALARY	3-1-60 GRADE	3-1-60 SALARY	3-1-81 GRADE	3-1-81 SALARY	3-1-82 GRADE	3-1-82 SALARY	3-1-83 GRADE	3-1-83 SALARY	END DATE	END GRADE	END SALARY
49	JOHNSON A	113083	8	1200									030184	8	1200
50	JOHNSON D	030380	3	540			4	675		880	6	990	030184	7	1368
51	JUDD K	080883	5	1000									030184	5	1050
52	KING D	011184	5	1040									030184	5	1040
53	KWAST K	090783	5	875									030184	6	975
54	LEVEY J	070883	5	900									030184	5	945
55	MCDANIEL F	050181	2	956						1052	2	1052	030184	5	1136
56	MCELVANY K	071081	2	575					4	765	4	840	030184	5	960
57	MCMAHON R	112982	7	950							7	950	030184	7	1030
58	MADRID M	062183	4	694									030184	3	867
59	MARTIN D	021384	4	800									030184	4	800
60	MATHIS G	011981		825				825	5	990	5	1080	030184	5	1170
61	MILLER V	052682	3	825	3	675					4	875	030184	4	945
62	NETTLES B	052679	2	525	2	675	5	630	5	825	5	900	030184	5	985
63	PERDUE R	102179	4	580	4	625	5	700	5	865	5	935	030184	5	1005
64	REEVES W	102179	4	640	4	640	4	730	4	886	4	975	030184	5	1065
65	REYNOLDS G	102179	7	835	7	835	7	825	8	1128	8	1245	030184	8	1470
66	RUSSELL T	080282	5	710							5	800	030184	5	900
67	RYAN L	092581	5	800					5	952	5	1028	030184	5	1088
68	SESSIONS C	031484	8	1350									030184	6	1350
69	SMITH LINDA	020182	6	900					6	900	6	990	030184	6	1070
70	SNELSON G	072880	5	581			5	700	6	1034	6	1139	030184	9	1465
71	TEKELL M	102179	6	630	5	685	6	885	6	1080	7	1200	030184	7	1305
72	TURNER E	102783	5	900									030184	5	900
73	VINCENT L	102179	4	625	4	660	4	730	4	891	4	1000	030184	4	1090
74	WACASEY B	012181	4	624				623	4	825	4	900	030184	5	1000
75	WHITFIELD T	092280		537				580	4	765	4	830	030184	5	900
76	YARBOROUGH M	090281	4	581					4	718	4	765	030184	4	855
77	YAZELL T	053183	5	750									030184	5	884
78		000000											000000		
79	ANDERS O	102179	4	910	4	908							090580	4	979
80	BALIK R	111281		693									121181		693
81	BANKSTON T	042781	5	607					5	761	5	821	070183	4	821
82	BARBOLLA M	021480	4	598	4	597							050680	5	598
83	BARNES B	110183	5	1000									110483	5	1600
84	BARTO B	102179	4	589	4	623							101080	5	724
85	BARTON K	052181	5	607									081481	5	607
86	BAYUK L	120583	8	1250									021084	8	1250
87	BEEBE D	042081	2	650									062681	2	650
88	BENTON D	102179	8	825	8	900	8	1150					081481	8	1150
89	BOLDING C	050181	5	607					5	735			060482	5	737
90	BROOME A	102179	4	650	4	650							050880	5	650
91	BROWN C	102179	2	590	2	620							041880	2	620
92	BROWN K	102979	4	589	4	640	8	800					121881	8	875
93	BUNDICK B	102179	4	600									102379	4	800
94	CARR P	011882	6	593									012982	6	955
95	CARSON S	011180	4	640	4	640	4	760	8	1029	8	1134	082683	8	1184
96	CARTER K	121780		1040									031581		1040

EMPLOYEE GRADE AND SALARY HISTORY

NO.	EMPLOYEE NAME	START DATE	START GRADE	START SALARY	3-1-80 GRADE	3-1-80 SALARY	3-1-81 GRADE	3-1-81 SALARY	3-1-82 GRADE	3-1-82 SALARY	3-1-83 GRADE	3-1-83 SALARY	END DATE	END GRADE	END SALARY
97	CHAMBLISS C	092280	2	590			3	650					042881	5	650
98	CHOATE N	120182	5	693							5	692	061983	5	745
99	COOPER L	033180	2	600			6	745	7	957			111981	6	957
100	CRETSINGER M	102179	3	585	3	615	4	700	4	946			081382	4	1060
101	CUMMINGS L	012781	5	653			5	692	5	908			061882	5	1019
102	CUREAU L	061583	7	1135									111583	7	1135
103	DAVENPORT R	112583	7	1200									120683	7	1200
104	DENNIS L	051580	1	607			2	605					031281	1	607
105	DENTON B	121779	4	589	4	588	5	640					042481	5	641
106	DESILETS L	011382		780									011383		780
107	DUCKER K	011480	3	540	3	540							061380	3	595
108	DUNHAM F	051980	5	581									012281	5	641
109	FRIDELL M	102979	3	530									011180	3	530
110	GILLILAND M	102179	5	650	5	650							121580		775
111	GRAY L	102179	4	620	4	670							071180	5	695
112	GREENFIELD L	060182	5	693							5	744	060683	5	745
113	GROSS D	123081	5	910					5	908	5	952	120182	5	953
114	HALL D	062281	5	725					5	908			062382	5	908
115	HARR V	102179	4	650	4	695							100180	5	695
116	HEFNER S	102179	6	680	4	680	4	790	4	939			020483	4	1005
117	HESTER R	102179	4	630	4	730	5	830	5	913			013082	5	913
118	HINTON L	102179	4	630	4	630	5	775	5	957			071582	5	957
119	HOUSER L	022282	5	725					5	725			011283	5	820
120	HOWARD CARLA	010280		850		850							031480		850
121	HOWL P	010281	2	650			2	650					040261	2	650
122	HYDE R	102179	1	537	1	580							082980	1	633
123	JENKINS J	031681	5	607									092561	5	693
124	LANIER P	102179	4	605	4	655							043080	4	655
125	LEAVITT G	102179	8	820									021560	8	865
126	LEE K	060280	5	581			5	675					091581	5	705
127	LIPFORD W	102179	1	624	1	623	4	700					041481	4	700
128	LITTLE L	031483	6	850									082583	6	900
129	LOVE D	102179	5	690	5	755	5	825					022681	5	825
130	MCCARTY J	100980	5	700			5	725	5	880	5	942	042183	5	942
131	MCCAULEY V	020981	5	650			5	649					091681	5	705
132	MCKINNEY J	102179	4	635	4	670							062380	5	710
133	MAYBERRY P	110981	5	750					5	875	5	935	042583	5	935
134	MIDDLETON G	032480		693									061780		693
135	MILLER M	040582	7	1125							8	1235	100182	7	1235
136	MOCIO D	122181	5	823					5	822	5	865	061783	5	919
137	MOKSZYCKI P	062381	2	650					2	781	6	900	041483	6	900
138	MOORE C	111780	2	537									123160	2	537
139	MOTT J	100680	5	581			5	580					021281	5	581
140	NOBLE C	102179	3	630	3	630							052360	3	630
141	PAUL J	051982	5	780				840			5	825	101483	5	875
142	PEACOCK E	102179	4	680	4	745	4	820	6	985	6	1060	022583	6	1060
143	PHELPS P	121283	6	1430									020184	6	1430
144	PRIDGEON C	022580	4	660	4	660							042980	5	660

EMPLOYEE GRADE AND SALARY HISTORY

NO.	EMPLOYEE NAME	START DATE	START GRADE	START SALARY	3-1-80 GRADE	3-1-80 SALARY	3-1-81 GRADE	3-1-81 SALARY	3-1-82 GRADE	3-1-82 SALARY	3-1-83 GRADE	3-1-83 SALARY	END DATE	END GRADE	END SALARY
145	RICE D	111780	2	590			2	590					022081	2	590
146	RIDLEY H	111583	3	820									022784	3	820
147	ROBERSON R	091180		633				666		778		848	022684		936
148	ROBERTS C	102179	6	760	6	760	6	955	7	1166			010183	7	1271
149	ROBSHAW N	100681	5	725					5	863	5	925	081963	5	925
150	SCARBOROUGH P	040780	3	550			4	650	5	864	5	944	112583	5	1020
151	SCHELL L	102179	4	600			5	735					091581	5	735
152	SCHMIDT C	102179	6	675	6	675	7	800	7	985			011483	7	1100
153	SCHWINKENDORF J	092881	5	750									103081	5	750
154	SMITH J	061681	5	607									080781	5	607
155	SMITH LISA	110183	5	850									110483	5	850
156	SPILLMAN D	102179	4	600	4	636							000000	5	636
157	STALLONS D	102179	4	635	4	635							123180	4	725
158	STOCKTON J	111681	3	630					3	608			052882	3	745
159	STRITTMATTER L	030182		867									062482		867
160	VANDYKE C	050580	3	560			3	650					071581	3	650
161	WARREN V	030981	2	600					6	900	7	985	120983	7	1075
162	WATSON P	081081	4	710					6	847	6	915	113083	6	1025
163	WEATHERLY P	102179	7	800	7	850	7	925					063081	7	925
164	WEATHERS L	102179	4	600									011080	4	600
165	WERNER C	102179	4	650	4	650							050860	5	650
166	WHITE G	092881	4	800					7	960	7	1095	060983	7	1095
167	WHITE S	102179	8	900	8	900							100960	8	900
168	WHITEHEAD T	092881	5	607									101681	5	607
169	WILSON S	070180		775				800					010882		963
170	JOYCE R	102179	1	641	1	519	2	605	2	718	2	718	030184	2	760

DEFENDANT'S EXHIBIT 7

Fort Worth

POPULATION BY ETHNIC IDENTITY FOR FORT WORTH AND SELECTED AREAS 1980

Source: 1980 Census of Population

FORT WORTH		1980 Population	% of Total
White		265,428	68.9
(White	216,732)		56.3
(Spanish	48,696)		12.6
Black		87,723	22.8
Other		31,990	8.3
(Amer.Indian, Eskimo & Aleut	1,227)		0.3
(Asian & Pacific Islanders	2,340)		0.6
(Other	28,423)		7.4
Total Population		385,141	

TARRANT COUNTY		1980 Population	% of Total
White		711.965	82.7
(White	644,333)		74.8
(Spanish	67,632)		7.9
Black		101,183	11.8
Other		47,732	5.5
(Amer.Indian, Eskimo & Aleut	3,050)		0.4
(Asian & Pacific Islanders	6,465)		0.7
(Other	38,217)		4.4
Total Population		860,880	

FORT WORTH METROPOLITAN AREA
(Tarrant, Johnson, Hood, Parker & Wise Counties)

White		862,010	84.7
(White	788,460)		77.5
(Spanish	73,550)		7.2
Black		103,670	10.2
Other		51,750	5.1
(Amer.Indian, Eskimo & Aleut	3,480)		0.3
(Asian & Pacific Islanders	6,772)		0.7
(Other	41,498)		4.1
Total Population		1,017,430	

FORT WORTH/DALLAS SMSA
(Standard Metropolitan Statistical Area)

White		2,373,962	79.8
(White	2,124,349)		71.4
(Spanish	249,613)		8.4
Black		419,272	14.1
Other		181,644	6.1
(Amer.Indian, Eskimo & Aleut	11,225)		0.4
(Asian & Pacific Islanders	24,549)		0.8
(Other	145,870)		4.9
Total Population		2,974,878	

EXHIBIT

B

SUPREME COURT OF THE UNITED STATES

No. 86-6139

CLARA WATSON,

Petitioner

v.

FT. WORTH BANK & TRUST

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

June 22, 1987